

TRIBAL TELECOMMUNICATIONS ISSUES

JOINT HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE**
AND THE

COMMITTEE ON INDIAN AFFAIRS

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MAY 14, 2002

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ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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TRIBAL TELECOMMUNICATIONS ISSUES

WEDNESDAY, MAY 14, 2002

U.S. SENATE, COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION, MEETING JOINTLY WITH THE COM-
MITTEE ON INDIAN AFFAIRS,

Washington, DC.

The Committees met, pursuant to notice, at 10:06 a.m. in room SR-253, Russell Senate Office Building, Hon. Daniel K. Inouye, Chairman of the Senate Committee on Indian Affairs, presiding.

OPENING STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO

Senator CAMPBELL [presiding]. This joint Committee session will start without Senator Inouye. He is running a little bit late and asked me to go ahead and start the Committee hearing. We thank him for scheduling today's hearing on telecommunications in Indian Country. Since the arrival of the Internet over 20 years ago, every American surely recognizes its potential to improve our economy and our standard of living.

In general, availability of telecommunications information technology in Indian communities is not the rarity it was 10 years ago. In fact, it is sizeable and growing. A number of Tribes are already involved in telecommunications. Tribal involvement ranges from connecting Indian schools to the Internet, to Tribes regulating and operating telecommunications services on Indian reservations themselves. We still have a long way to go, however. Only 39 percent of Indian households have telephones, compared to 94 percent of non-Native households.

Law enforcement officers on reservations are often at a disadvantage because of poor communications equipment, in some cases, in fact, costing their lives. Most Indian kids are not being connected to the world via the Internet, as other American kids are, and health care to rural areas like remote areas of Alaska are made more difficult and, in fact, businesses are simply walking away because of the lack of physical infrastructure on Native lands.

In Native and non-Native communities, telecommunications is the backbone to development. The weak economic base in much of Indian America, especially in the Plains Tribes of the Upper Midwest, make it difficult to support infrastructure investment. For many private communications firms, it is simply not profitable to provide services to the vast expanse of Native American lands. In turn, the lack of physical infrastructure makes it difficult for these same Native communities to undertake and attract successful eco-

conomic initiatives, so Tribes in many cases are in a Catch-22 situation.

But there is reason for hope. Tribes, tribal organizations and the business sector are all focusing on the issue, and looking to broaden technology options for Tribes and helping them to develop a physical telecommunications infrastructure. While we are still years away from getting all of Indian America online, I know this hearing will do a great deal in informing us how we achieve that end.

With that, I would call on Senator McCain.

**STATEMENT OF HON JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA**

Senator MCCAIN. Thank you, Vice Chairman Campbell, and I want to thank Senator Inouye for holding this hearing with the Commerce Committee as well. It is a very important topic, and we all know how important telephone and telecommunications is, not only to the world, but to the United States of America, and unfortunately many Native American communities across the United States have been left behind.

According to 1990 U.S. Census data, only 47 percent of tribal households had telephone service. In the 1990 Census, I am sorry to say, Mr. Chairman, that 4 of the 10 lowest telephone penetration rates were for reservations in the State of Arizona, San Carlos, Navajo, Gila River, then Mississippi, and then Fort Apache. It is not a pleasant statistic for me to contemplate.

In 1997, Senator Inouye and I worked together to include an amendment in the 1996 Telecommunications Act to prevent a further degradation of service to tribal communities. That amendment ensured that tribal telephone companies would continue to receive universal service support for the provision of local telephone service.

I think we all know that wireless is the answer to our problems in the Indian Country, particularly in a reservation the size of the Navajo Reservation, but I think it is also very clear that we are not doing enough. I look forward to hearing from the witnesses today as to how we can address this very serious problem in our society, and particularly on Indian reservations, and I thank you, Mr. Chairman.

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT OF HON JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

Thank you, Mr. Chairman, for holding today's joint hearing on this very important topic. In particular, I am pleased the Committee is joined by the Members of the Indian Affairs Committee in addressing this critical issue.

The advent of the telephone was one of the greatest technological marvels in American history. Years ago, having a telephone was a luxury. Today, having basic telephone service is a necessity that most of us take for granted. It is critical in order to communicate with family, friends, business contacts, and more importantly, for use in times of emergency. The explosion of wireless services and the rollout of new and advanced telecommunications services are changing the world as we know it and giving Americans access to information in a way we never imagined.

Unfortunately, many Native American communities across the United States have been left behind during the information age and do not have access to advanced telecommunications services, or even basic phone service. According to 1990 U.S. Census data, which is the most recent data available on telephone penetration on

tribal lands, only 47 percent of tribal households had telephone service. In Arizona, these statistics are even more staggering. For example, the 1990 Census found the telephone penetration rate on the Gila River Indian Community to be 22 percent. According to the Navajo Nation, they have a penetration rate of 24 percent.

These are sad—and frankly unacceptable— statistics, especially at a time when the world is in the midst of a telecommunications revolution. As the information age progresses, no segment of the American community should be left behind.

In 1997, Chairman Inouye and I worked together to include an amendment in the 1996 Telecommunications Act to prevent a further degradation of service to tribal communities. That amendment ensured that tribal telephone companies would continue to receive universal service support for the provision of local telephone service, which is something that the Telecom Act had not ensured.

Even with universal service support, however, wireline telephone service is not likely to become the mainstay of tribal telecommunications. Instead, wireless technologies represent the future, just as they do in many developing countries throughout the world. This is good, because wireless technologies are technically more versatile than many wireline telephone systems and cheaper and quicker to construct.

In 1998, I placed a very special phone call to Naomi Chiago, an elder of the Salt River Pima-Maricopa Indian Community. This was an important phone call because until that time, Ms. Chiago never had the opportunity to receive a phone call at her home. However, the deployment of a fixed wireless system allowed her to have basic phone service. I hope that phone calls like these become more of a reality for our nation's Native American communities.

Again, I thank the Chairman for holding this important hearing and look forward to hearing from today's witnesses.

Senator CAMPBELL. Thank you, Senator McCain. In order of arrival for opening statements we will go to Senator Burns.

**STATEMENT OF HON. CONRAD BURNS,
U.S. SENATOR FROM MONTANA**

Senator BURNS. Thank you, Senator Campbell, and I appreciate Senator Inouye calling this hearing, especially a joint hearing. I will submit my statement, but I just want to paraphrase some things. You know, we do a good job in identifying the problem reading statistics and all of those things, but we do not do a very good job in following through on what Senator McCain and Senator Inouye did in the 1996 Telecommunications Act.

I have 7 reservations in my State. We have moved along as well as could be expected in wiring our interactive systems from our universities, at the University of Montana and Montana State University into the colleges, into the 2-year colleges on our reservations, but the stats do not lie that we have not done a lot about residential or other communication challenges that we find on the reservation.

And Senator McCain is exactly right, wireless is going to play a big role in this, because in my country, and especially in Indian country, we have got a lot of dirt between light bulbs, and I have used that old phrase so many times I am going to wear it out, but people are starting to understand it now.

I think what we have to do today, and with this hearing, and what will surface, I think, is to identify the parameters in which we have to work, and also the challenges within those parameters. We have to peel back multiple layers of the onion to get down and make policy that will work in Indian Country. Some of the layers I believe need discussion, and they should include, how do we provide basic service to reservations when incomes are averaging less than \$10,000 a year? It is an economic fact, and we have to deal

with that one way or another, or those conditions, because that prevents us from deploying a lot of services, advanced services, broadband services, wireless broadband, and all of those, and I think it is time we look at it.

How do we approach language barriers and the lack of interest in phone service? How do we overcome those cultural obstacles that get in our way from deploying good communications services, and how do we collect timely data on reservation penetration and deployment? How do we do those things?

So we certainly have a lot of challenges ahead of us. It is important that we recall and refer back to the mandates of the work that Senator McCain and Senator Inouye and a lot of us that participated in the 1996 Act, where we clearly stated, and I quote, "All consumers in all regions of the Nation, including low-income consumers in those rural insular and high-cost areas, should have access to telecommunications and information services."

Now, we passed this 6 years ago, and right now our infrastructure is just not in a position where it is ready to build out, and it is paramount that the Tribes become more involved in the process, and we have their constant involvement and of course their consultation.

A final note, Mr. Chairman. It is a pleasure to have Mike Strand here on the panel today. Mike is executive president and general counsel to the Montana Independent Telecommunications System, and that is a system that we and the State should be very proud of, and we do not talk, Mike, enough about it, but what the independents and the coops have done is to basically wire our State without going past customers.

We had a big build-out of fiber, as you know, nationwide, but they built right past our customers. Well, this organization that Mike is involved with is doing a tremendous job in bringing those broadband services to Tribes and rural areas across Montana, and I think he could probably share with us today some of the challenges that they had, but also can give us an idea on how we could change our policy to make some things happen, and I appreciate him being here today, and I thank the Chairman.

[The prepared statement of Senator Burns follows:]*

Senator CAMPBELL. Senator Boxer.

**STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM CALIFORNIA**

Senator BOXER. Thank you so much, Mr. Chairman, and I want to welcome everybody here, thank the leaders of both sides of the aisle, both Committees.

I really think this is an issue that, as we learn about it, we can work across the aisle on. I mean, we have talked about the digital divide. Well, here it is. I mean, it is right here, and it is something we can do something about together, so I simply want to take about 2 minutes of time to welcome Sue Masten in particular, chair of the Yurok Tribe of Northern California. I am very proud of her. The Yurok Tribe is the largest Tribe in my State, and the Yurok Reservation is located in a rural, remote area of Northern Cali-

*The information referred to was not available at the time this hearing went to press.

fornia. I have had the pleasure of working with Sue on a number of issues, and she is a terrific person, and there is no problem too large for her, so we just need to work with her to resolve this, and with all our people who are in this situation.

The telephone was invented more than a century ago and, as Senator McCain said, only 47 percent of our Native Americans on reservations have a telephone. I think it speaks poorly of us that we have not paid attention to this problem. We are essentially leaving some of our Indian reservations stranded in the 19th Century, Mr. Chairman, and I do want to work with all of you to change that.

You know what is amazing is, the Yuroks are 360 miles from Silicon Valley. When you think about that, 360 miles from Silicon Valley, and yet they are on the wrong end of the digital divide. As Sue will point out, 180 households and two public schools are without basic telephone service. In the most basic of terms, it means that if a grandfather in one of those homes has a heart attack, he has no phone with which to call an ambulance. If a wife goes into labor, she cannot contact her husband for assistance, and in terms of economic development, businesses are difficult to attract because of the lack of phone service. That is obvious. Without phone service you cannot reach customers, you cannot sell things you make. It is just a terrible situation, so the artisans cannot sell their wares outside the reservation, or if they do, it is very cumbersome.

It keeps the kids from being able to access all of the educational tools we all know about. Only 9 percent of individuals living in Native American communities nationwide have personal computers. Only 8 percent have access to the net. We have to do better.

So Mr. Chairman, I am pulled to another Committee hearing, but that does not in any way show a lack of interest. I very much want to work with you. We have worked together on a lot of things, so please include me, because I know you and Senator Inouye and Senator McCain have been leaders on this, and I hope you will call on me to do everything I can to change this dire situation. Thank you.

Senator CAMPBELL. Thank you. I think most of our witnesses recognize the conflicts all of us have.

Senator Thomas.

**STATEMENT OF HON. CRAIG THOMAS,
U.S. SENATOR FROM WYOMING**

Senator THOMAS. Thank you, Mr. Chairman. I will file my statement, but I want to just say that coming from a State like Wyoming, why, rural as we are, I understand some of the difficulties that go on there, and certainly we all want to provide these kinds of services on the reservations. But I think we ought to talk a little more about what some of the basic reasons that it is not, and get down to the real cost. We can talk about, we want it there. Everybody does that, but we need to talk about fractionalized land, for example, where you cannot get rights of ways. We need to talk about some of the other real causes of the slowness in getting there, and I hope the witnesses will do that, and we will do that, and really get down to the roots of it.

Thank you, sir.

[The prepared statement of Senator Thomas follows:]*
 Senator CAMPBELL. Thank you, and Senator Inouye is with us now for the testimony from the witnesses. Senator.

**STATEMENT OF HON. DANIEL K. INOUE,
 U.S. SENATOR FROM HAWAII**

Chairman INOUE. I am embarrassed to be late, but we are in the first cycle of the Appropriations Committee, and we have a few problems.

[Laughter.]

Chairman INOUE. So if I may, I would like to place my statement in the record. It is a good statement. I just want to point out that communications are very important, and in Indian country, for example, in Navajo land, I think the latest study would indicate that less than 30 percent of the households have access to telephones, and less than 10 percent of the households have access to Internet. With that, I do not think we can maintain our Government-to-Government relationship in a proper fashion for the 21st Century. So with that, I thank you all, and may we proceed with our first witness, the chief of Consumer and Governmental Affairs Bureau of the FCC, Mr. Snowden.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUE,
 U.S. SENATOR FROM HAWAII

Good morning. Today's joint hearing, convened by both the Senate Commerce and the Indian Affairs committees, focuses on tribal telecommunications issues. As such, it gives us the opportunity not only to examine the obstacles facing Native communities in obtaining basic telephone and Internet services, but also to chart the important progress being made by many tribes over the past few years. In addition, we appreciate the participation of Mr. Snowden, so that we might be informed of the FCC's recent efforts to fulfill its trust responsibility to federally-recognized Indian tribes and to promote the expanded availability of telephone service on tribal lands.

In today's world, access to telephone service is essential. Telephones permit parents to communicate with their children. They enable people without jobs to contact prospective employers. They allow individuals with health problems to seek emergency medical assistance. And finally, they help businesses serve and stay in touch with their customers. Similarly, while new by comparison, the Internet is fast becoming a necessary part of modern day life—not only for communication, but also for access to educational, medical, political, and financial information.

Unfortunately, for too many Native Americans living on tribal lands, these essential services are not yet part of everyday life. Often, a variety of factors contribute to the lack of telephone and Internet service on tribal lands, including: low population density, geographical remoteness, low income, and high unemployment.

In 1999, a Commerce department survey studying the technology infrastructure of Native communities found that only 39 percent of households in rural Native communities had basic telephone service, and that only 8 percent of rural households in Native communities had access to the Internet. These grim statistics not only fall well below the national average, but also provide a window to the many obstacles facing tribal leaders in encouraging economic development on reservation lands.

In July of 1999, the Administration took a number of steps to raise awareness of these challenges, including President Clinton's historic visit to the Pine Ridge Indian Reservation in South Dakota—the first visit to a tribal reservation by a sitting President since President Franklin Roosevelt.

Following this historic visit, the FCC initiated a number of proceedings to reaffirm its commitment in helping federal tribes to meet their communications needs. In June of 2000, the FCC released a Policy Statement acknowledging the sov-

*The information referred to was not available at the time this hearing went to press.

ereignty of federally-recognized Indian tribes and reaffirming its commitment to promoting government-to-government relationships between the FCC and tribes.

Since then, the FCC has initiated other programs designed to expand the availability of telephone service, including an expansion of Universal Service programs for low-income residents living on tribal lands and the creation of wireless bidding credits for new licensees willing to serve Native communities.

Today, we look forward to the testimony of our witnesses to determine if these programs are working, whether we are collecting data sufficient to chart our progress, and what more can and should be done to extend the reach of telephone and Internet service in these areas. As such, we look forward to constructive criticism and new ideas as to how the federal government and the FCC might better encourage the spread of telecommunications services on tribal lands and might better meet its responsibilities to tribal governments.

One item of particular concern is the current process by which competitive telephone carriers apply for eligible telecommunications carrier" or "ETC" designations that are a prerequisite for the receipt of certain universal service subsidies. Under the current process, carriers seeking an ETC designation for service provided on tribal lands may apply to the FCC *only* in cases where the carrier would not be subject to state jurisdiction. Unfortunately, this deference can lead to undue delay as such carriers may face the burden of establishing the proper forum for their application before there is any consideration on the merits of its request. Given the Federal government's trust relationship with federally-recognized Indian tribes, I believe that we have an obligation to review these and any procedures that might slow the roll-out of telecommunications services to underserved tribal communities.

Accordingly, I look forward to the testimony of the witnesses and to the questions and comments of my colleagues here today. Let me now yield, to my colleague the ranking member of the Commerce committee and former Chairman of the Indian Affairs committee, Senator McCain.

**STATEMENT OF K. DANE SNOWDEN, CHIEF,
CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FEDERAL
COMMUNICATIONS COMMISSION**

Mr. SNOWDEN. Good morning, Mr. Chairman and Members of the Committee. My name is Dane Snowden. I am the chief of the Consumer & Governmental Affairs Bureau at the Federal Communications Commission. I appreciate this opportunity to appear before you today to discuss tribal telecommunications issues.

On March 25, 2002, the FCC formally completed its reorganization and formed the Consumer & Governmental Affairs Bureau. The bureau serves as the agency's primary liaison with other Federal agencies and Tribal, State, and local governments. It implements the commission's consumer-related policy, it responds to consumer inquiries and resolves informal complaints, and finally, it engages in outreach and education initiatives intended to inform consumers about important telecommunications issues and initiatives.

As Senator Burns just stated, Congress articulated a national goal that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services. Two years ago this June, the FCC took steps consistent with this goal to address historically lower than average telephone penetration rates on tribal lands. The commission concluded two comprehensive rulemakings that resulted in measures to promote telecommunications subscribership and infrastructure deployment within American Indian and Alaskan Native tribal communities.

In the first of these orders, the commission amended its universal service rules to provide additional targeted support under the universal service low income programs. These Lifeline and Link

Up programs help consumers pay for monthly service and installation, and create financial incentives for carriers to serve and deploy facilities in areas that may have previously been regarded as high risk and unprofitable.

The commission's amendments included up to \$25 per month in additional Federal Lifeline assistance on tribal lands. The enhanced Lifeline support program brings basic monthly rates on tribal lands down to \$1 per month in most cases, while the Link Up program helps defray up to \$100 of service initiation costs on tribal lands.

In adopting these enhanced low income programs for residents of tribal lands, the commission also recognized that many consumers in rural and low income communities did not know about the Lifeline and Link Up programs, so the commission required telecommunications carriers that participate in the programs to publicize the availability to Lifeline and Link Up.

In June 2000, the commission also adopted a policy statement in response to the request of Indian leaders for a statement of policy reaffirming its recognition of tribal sovereignty and the special trust relationship existing between the Federal Government and federally recognized Tribes. Among other things, the FCC committed to endeavor to work with Indian Tribes on a Government to Government basis consistent with principles of tribal self-governance to ensure that Indian Tribes have adequate access to communications services.

Although the commission's efforts are less than 2 years old, these actions appear to have accomplished a number of key goals. For example, more consumers have been made aware of the enhanced Lifeline and Link-Up programs and, as a result, more people are getting affordable telephone service on tribal lands. Since first implemented in the last quarter of 2000, enhanced Lifeline subscribership has increased by approximately 177 percent nationwide.

Increased access to basic telecom services can mean greater prosperity, both economic and otherwise, for all. Conversely, the absence of basic telephone service within the home places its occupants at a disadvantage with respect to seeking employment and contacting emergency personnel, for example. The commission believes that with greater awareness of the tools and resources available to increase telecommunications access, tribal nations will be better able to help connect their members to much-needed telecommunications services both as consumers and, for some, as providers of those services.

The commission is committed to bringing this knowledge to Indian Country through a variety of means. Currently, the commission provides information to tribal communities about enhanced Lifeline and Link Up and other matters related to telecommunications services through meetings with tribal representatives, its Web site, and its toll-free consumer centers.

In addition, this June the commission is launching a national outreach program called Get Connected, Afford a Phone, which seeks to inform consumers on nontribal and tribal lands about the availability of the Lifeline and Link-Up programs. As part of this initiative, we will contact each of the more than 550 federally rec-

ognized Tribes and various Tribal Associations. We will also coordinate with those Federal agencies providing services on tribal lands, and provide information and guidance on how to take advantage of these programs. In addition, the bureau will continue to endeavor to work closely with your respective Committees in these efforts.

The FCC remains committed to advancing the goals of improving the quality of life in Native American communities through improved telecommunications access. Rather than a single annual outreach event, the commission will focus on a series of interactive workshops among Tribes, Federal Government agencies, and the communications industry. Our new approach will be called the Indian Telecommunications Initiative, or ITI, and it will acknowledge that different Tribes are in different stages of economic development and face different impediments to telecommunications deployment.

The goal of ITI is to encourage partnerships among Tribes, Federal agencies and industry to improve telecommunications access in Indian communities, and to do so in a manner that may permit the commission to target those communities where the need is most pronounced.

Finally, with the formation of the Consumer & Governmental Affairs Bureau, the commission will formalize meetings between Tribes and commission staff to provide a forum and a single point of entry for individual tribes to explore the various tools and resources available to them. Ultimately, our goal is to engage more direct input from Indian Country to decide how to move forward in bringing telecommunications access to Native American communities.

Working collaboratively with other Federal agencies, rather than in isolation, the commission believes it can be more effective in improving the overall quality of life for residents of Indian Country through telecommunications development. By casting a broad net and seeking input, coupled with a targeted approach, the commission increases the chances of finding workable solutions that can be adapted to meet the telecommunications needs of Native American communities.

I thank you, and I look forward to any questions.

[The prepared statement of Mr. Snowden follows:]

PREPARED STATEMENT OF K. DANE SNOWDEN, CHIEF, CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FEDERAL COMMUNICATIONS COMMISSION

I. Introduction

Good morning, Mr. Chairman and Members of the Committees. My name is K. Dane Snowden, and I am the Chief of the Consumer & Governmental Affairs Bureau at the Federal Communications Commission. I appreciate this opportunity to appear before you today to discuss tribal telecommunications issues.

On March 25, 2002, the FCC formally completed its reorganization. As part of that reorganization, the Consumer & Governmental Affairs Bureau was formed. The Bureau serves as the agency's primary liaison with other Federal agencies and tribal, state and local governments. It implements the Commission's consumer-related policy through rulemakings that address issues such as slamming and cramming. It responds to consumer inquiries and resolves informal complaints. And finally, it engages in outreach and education initiatives intended to inform consumers about important telecommunications issues and initiatives.

As part of its intergovernmental affairs functions, the Bureau has primary responsibility within the agency for establishing and developing relationships with Federally-recognized American Indian tribes. The Bureau works closely with the Commis-

sion's other bureaus and offices to address telecommunications issues of concern to the tribes.

II. Background

The Telecommunications Act of 1996 codified the Commission's historical commitment to promote universal service to ensure that all Americans have access to affordable, quality telecommunications services. Congress articulated a national goal that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services." Those living in American Indian and Alaskan Native tribal communities are included.

Two years ago this June, the FCC took steps consistent with this goal to address historically lower-than-average telephone penetration rates on tribal lands. The Commission concluded two comprehensive rulemakings that resulted in measures to promote telecommunications subscribership and infrastructure deployment within American Indian and Alaskan Native tribal communities. In the first of these *Orders*, the Commission amended its universal service rules to provide additional, targeted support under the universal service low-income programs, the so-called Lifeline and Link-Up programs, to help consumers pay for monthly service and installation and create financial incentives for carriers eligible to receive universal service support to serve and deploy facilities in areas that may previously been regarded as high-risk and unprofitable.

Lifeline allows eligible consumers to save money on their basic monthly telephone service fee. The Commission's amendments included up to \$25.00 per month in additional Federal Lifeline Assistance on tribal lands. This Enhanced Lifeline support brings basic monthly rates on tribal lands down to \$1 per month in most cases. In comparison, for consumers living on non-tribal lands, the discount is up to \$8.50 per month, depending on the state of residence. Link-Up offsets initial connection charges and line extension costs associated with the initiation of service. Link-Up helps defray up to \$100 of such costs on tribal lands, and up to \$30 on non-tribal lands. For more information about these programs see <http://www.fcc.gov/cgb/consumerfacts/lowincome.html>.

In addition to implementing these amendments, the Commission broadened the consumer qualification criteria for low-income consumers on tribal lands to include income-dependent eligibility criteria employed in means-tested programs in which Native Americans may be more likely to participate. These include Bureau of Indian Affairs general assistance, Tribally Administered Temporary Assistance for Needy Families (or TTANF), Head Start or the National School Lunch Program.

In adopting these "Enhanced" low-income programs for residents of tribal lands, the Commission also recognized that many consumers in rural and low-income communities did not know about the Lifeline and Link-Up programs. So, the Commission required telecommunications carriers that participate in the programs to publicize the availability of Lifeline and Link-Up to reach those likely to qualify for them.

Finally, in this *Order*, the Commission established a framework designed to streamline the process for eligibility designation of carriers providing service on tribal lands. With such designation, carriers are eligible to receive universal service support. Under this framework, a carrier seeking an eligibility designation for the provision of service on tribal lands may petition the Commission for such designation.

In a companion *Order*, the Commission established bidding credits for use by winning bidders in spectrum auctions who pledge to deploy facilities and provide service within three years to Federally-recognized tribal areas that have a telephone penetration rate at or below 70 percent. A winning bidder may receive a \$300,000 credit for up to the first 200 square miles of qualifying tribal lands within its license area.

Finally, in June 2000, the Commission adopted a Policy Statement in response to the requests of Indian leaders for a statement of policy reaffirming its recognition of tribal sovereignty and the special trust relationship existing between the Federal government and Federally-recognized tribes. In this statement of policy, the FCC committed to, among other things, endeavor to work with Indian tribes on a government-to-government basis consistent with principles of tribal self-governance to ensure, through its regulations and policy initiatives and consistent with the Communications Act, that Indian tribes have adequate access to communications services.

These steps represented the culmination of an examination of the issues involved in providing access to telephone service for Native Americans living on reservations. This examination included, in part, meetings here in Washington involving Commission staff, representatives from other Federal agencies, and Indian tribal leaders, as well as field hearings in Albuquerque, New Mexico and Chandler, Arizona.

Today, the telephone penetration rate for tribal lands remains well below the nationwide rate of 95 percent. Although there is promising news for some tribes, looking more closely, we observe that certain tribes enjoy penetration rates approaching the national average; for others, the penetration rate continues to remain far below. For example, Mescalero Apache Telecom, a tribally-owned carrier which serves the Mescalero Apache Reservation in New Mexico recently celebrated its first anniversary and announced that it has more than doubled subscribership on the reservation from 650 to 1,449 customers. In contrast, last month I met with representatives of the Yurok Tribe of Eureka, California, who told me that basic phone service is not widely available to its members.

Although the Commission's efforts are less than two years old, these actions appear to have accomplished a number of key goals. For example, more people have been made aware of the Enhanced Lifeline and Link-Up programs, and, as a result, more people are getting affordable telephone service on tribal lands. Since first implemented in the last quarter of 2000, Enhanced Lifeline subscribership has increased by approximately 177 percent nationwide.

Because more consumers can afford service as a result of these programs, tribal communities have become more inviting to existing telecommunications carriers and, in some cases, even new carriers or providers. For example, Western Wireless and Smith Bagley, two wireless providers, have commenced serving Federally-recognized reservations in South Dakota, Arizona and New Mexico.

III. Targeted Indian Country Outreach

Increased access to basic telecommunications services can mean greater prosperity—both economic and otherwise—for all. Conversely, the absence of basic telephone service within the home places its occupants at a disadvantage with respect to seeking employment and contacting police, fire departments, and medical providers in an emergency, for example. Basic telecommunications services may also provide access to more advanced services. Voice telephone is currently the most common means of household access to the Internet, and the same copper loop used to provide ordinary voice telephone may be used for broadband services.

The Commission believes that with greater awareness of the tools and resources available to help increase telecommunications access, tribal nations will be better able to help connect their members to much-needed telecommunications services, both as consumers and, for some, as providers of those services. The Commission is committed to bringing this knowledge to Indian Country through a variety of means.

Currently, the Commission provides information about Enhanced Lifeline and Link-Up and other matters related to telecommunications services on tribal lands on its Internet site, <http://www.fcc.gov/indians>. Additionally, consumers may call the Commission's Consumer Center toll-free at 888-CALL-FCC and talk with an FCC customer representative to learn more about these matters.

In June 2002, the Commission is launching a national outreach program called, "Get Connected: Afford-A-Phone," which seeks to inform those otherwise eligible of the availability of the Lifeline and LinkUp programs. As part of this initiative, the Consumer & Governmental Affairs Bureau will contact each of the more than 550 Federally-recognized tribes. In addition, the Bureau has identified to date 25 tribal associations that will also be contacted. The Consumer & Governmental Affairs Bureau will also coordinate with those Federal agencies providing services on tribal lands and provide individuals easy-to-understand information and guidance on how to take advantage of these programs. Finally, the Bureau will continue to endeavor to work closely with your respective committees in these efforts.

One of the Commission's key outreach efforts in Indian Country is hosting educational conferences on increasing access to telecommunications services.

One of these conferences is the Indian Telecom Training Initiative (ITTI). The FCC postponed ITTI 2001 in the wake of the September 11, 2001 terrorist attacks and rescheduled it for September 2002. However, because of decreased advance registrations and acknowledgement of the first anniversary of the tragedy of September 11, the Commission decided, in consultation with our conference co-sponsor, the National Exchange Carrier Association (NECA), to cancel ITTI 2002.

The FCC remains committed to advancing the goal of improving the quality of life in Native American communities through improved telecommunications access.

The Commission will shift its focus from a single annual event to a series of interactive workshops among tribes, Federal government agencies and the communications industry to address telecommunications issues facing Indian Country. Our new approach will be called the Indian Telecommunications Initiative (ITI). It acknowledges that different tribes are in different stages of economic development, particu-

larly where telecommunications access is concerned, and recognizes that different tribes face different impediments to telecommunications deployment.

The goal of ITI is to encourage partnerships among tribes, Federal agencies, and industry to improve telecommunications access in Indian communities and to do so in a manner that may permit the Commission to target those communities where the need is most pronounced.

Finally, in addition to these targeted Commission initiatives, from time to time, tribal representatives meet with FCC staff to obtain information about our various telecommunications programs. With the formation of the Consumer & Governmental Affairs Bureau, the Commission will formalize these meetings between tribes and Commission staff to provide a forum for individual tribes to explore the various tools and resources available to them consistent with the government-to-government relationship acknowledged in the Commission's Policy Statement.

IV. Conclusion

Given the Commission's continuing commitment to increasing telecommunications access in Indian Country, we want to engage in dialogue with tribes, industry, and other Federal agencies as well as the states to decide how best to achieve our mutual goal.

Then, working with tribes and other interested parties, the Commission can further develop an outreach plan to address those needs on a more targeted level. Ultimately, our goal is to engage more direct input from Indian Country to decide how to move forward in bringing telecommunications access to Native American communities.

The Commission proposes to seek the input of other Federal agencies, especially those that are charged with issues like education, health care, housing and employment to draw on their expertise, as access to basic telecommunications services is key to each of these areas.

The Commission further proposes to seek the input of the telecommunications industry, so that the potential of all technologies: wireless, wireline, cable and satellite can be explored.

Working collaboratively with other Federal agencies, rather than in isolation, the Commission believes it can be more effective in improving the overall quality of life for residents of Indian Country through telecommunications development.

By casting a broad net in seeking input, coupled with a targeted approach, the Commission increases the chances of finding workable solutions that can be adapted to meet the telecommunications needs of Native American communities.

I look forward to answering any questions you have.

Chairman INOUE. Thank you very much, Mr. Snowden, and now may I call upon the chairperson of the Yurok Tribe of California, Ms. Masten.

STATEMENT OF SUE MASTEN, CHAIRPERSON, YUROK TRIBE

Ms. MASTEN. Good morning, Chairman Inouye, Vice Chairman Ben Nighthorse Campbell, and Committee members. It is a privilege and honor for me to be able to participate in a subject so dear to my heart as access to telephones and the Internet. I have the distinct honor of serving as the chairperson of the Yurok Tribe, which, as you heard from Senator Boxer, is the largest Tribe in California. We have 4,500 plus members.

We are located on the beautiful wild and scenic Klamath River in two of the northernmost counties in California, on the coast, Del Norte and Humboldt. We are in the heart of the redwoods. It truly is God's country, and when the Creator came to Yurok country he promised that the Yurok people would not want for anything, and before the early 19th Century we were self-sufficient and affluent.

However, that is not the case today. We had aboriginal territory that spanned over 400,000 acres. Currently our reservation at least is located within our homelands, and is approximately 55,000 acres. Unfortunately, because we had a wealth of redwood trees and in those days they said you could walk across the backs of the

salmon, we were hit hard with those things that hit Indian Country. You sell your land, oh, you have timber, your land went too. All those things that occurred everywhere else happened to us because we were wealthy in resources, so today, of a 55,000-acre reservation, only 3,000 acres are held in trust for the Yurok Tribe. So I do want to talk a little bit about the rural area, because we are in a river gorge one mile either side of the Klamath River, extremely rural; our communities upriver are at least 2 hours from any emergency services, and two-thirds of the reservation is without power or telephones. We have approximately, as the Senator indicated, 180 homes that are Upper Reservation, two elementary schools, a Head Start facility, a governmental facility, and several small businesses located on the Upper Reservation, all without telephone services.

We have been a Tribe that has always been federally recognized. However, we were not organized until 1993, when we adopted our constitution and elected our Government as we see it today. However, we have been extremely concerned about being able to provide telephone services to our community, and have been actively engaged in looking for ways to bring electricity and telephones to our Upper Reservation.

I think it is a shame that today, in this land of prosperity, and also in this land of opportunity, that there would be communities that would be without basic telephone services and without electricity. It is not okay that our children are growing up and will be disadvantaged, will not have the same opportunities, but will have the same expectations in the educational system and in the employment field that they know how to use the Internet, and that they know how to use computers. It is not surprising that they are not being able to be successful or competitive in the job market or in the educational system. Nor can we expect that our businesses will be competitive in the marketplace without having access to telephones or to the Internet to market their products. And without basic roads, telephone and electricity, it is difficult and impossible to attract businesses to the reservation, so it should not come as a surprise that we have an unemployment rate that is at 70 percent-plus, or that our poverty rate is at 90 percent-plus, and it is not likely that is going to improve without having those basic infrastructures in place.

I think you heard from the Senator when she talked about, we take for granted in our daily lives that we can call 911 if our mother or our father had a heart attack, or if a child was being born, or if someone falls or someone is drowning in the river. We take advantage of the fact that someone will be there within minutes. On our Upper Reservation, someone is not there for 2½ hours. If you are fortunate enough to get to a telephone to reach someone to come, you are 2 hours away from the telephone, and although some residents have radio telephones, they do not work if there is any fog in the area or any clouds, so if you get to a telephone it is unlikely that the radio phone will work to be able to provide that assistance to you. Emergency services being 2 hours away, it is likely that life-threatening situations will result in the loss of life, and that is not okay in this day and time, in our opinion.

I think it is also important to recognize that if we are going to be effective in trying in our own process in trying to bring telephones to the reservation, we have searched everywhere. Because we do not have economic development dollars, we cannot take advantage of the low interest rate loans, because how are we going to pay those loans back? If we cannot leverage the million dollars that we have by accessing other things that help us to bring telephones and electricity, we are not going to be able to overcome those barriers.

We are located in an area that is not franchised by a carrier, so although there are telephone services all around us, within 11 miles of us, the area that we are located in is not a franchised area by a carrier, and although our people have petitioned electric companies and telephone companies throughout the last 50 years, it has been to no avail because it is not cost-effective for these companies to do business. They are not going to recover their investment, and so we have been without telephone services or electricity.

I think that we have tried to make efforts. We have brought public safety to the area. We took advantage of the COPS grant, and although our offices have brought more coverage to the reservation, if the residents cannot call them in an emergency situation, using 911 or any other mode, then they are compromised for being able to provide those additional services. And although we currently are building two fire stations for the Upper Reservation through a HEAD grant, the residents will not be able to contact the volunteer firemen, so the best of what we can do is not to save a home, but to keep the fire from spreading to other areas or other homes, which is unfortunate.

We were able to in the initial stages contact the PUC in California to ask them for some assistance or recommendations for what we could do to try to bring telephone service to the reservation, and they suggested we contact the local carriers in the area. Well, at the time they told us they were not interested, but we learned of a possible sale that was occurring, and so we intervened in that sale to the PUC and asked for, because of public safety reasons, for them to intervene and to call for some provisions for bringing service to the reservation. And we were successful because of those public safety risk issues in convincing the PUC to provide additional provisions within that intervention that required them to bring telephone services to the Upper Reservation community at Weitchpec, which is at the most upper region in the territory, and to the two elementary schools in that region.

However, due to the economic situation the sale fell through. The current carrier, Verizon, is in confidential discussions with us, and we are hopeful that they will still want to meet some of those requirements that were conditions on the sale, and we are trying to remain optimistic that will happen.

I am running through here, because I am just talking to you about our situation, to be sure that I cover everything that I want to with you.

Under medical services, we are fortunate enough to have a medical clinic in our Weitchpec Office. However, in order for them to provide the service, and for their staff to be there and to man that facility, they require that a doctor be present, unless you can access

a doctor by telephone. We do not have telephones, and so unfortunately the clinic is only able to operate when the doctor can be present, which is only twice a month, as opposed to every day of the week, so our people are left without that service, and the nearest hospital is 2 hours away in the Hoopa Valley.

And as I mentioned, with economic development, with the additional burden of not having the basic infrastructure, it only allows for us to have very limited activities that occur on the reservation, and that is not going to provide for economic stability to those communities, and unless we do something to encourage that basic infrastructure development, it is not likely that the unemployment rate or the poverty level will improve for the Yurok Tribe.

Under housing, we do have a wonderful housing authority, wanting to encourage tribal members to move back to the reservation. It is difficult to build homes if you do not have electricity, roads, and power lines to be able to encourage people to want to live in the Upper Reservation Area. It is a hard way of life to live. To not be able to go to the refrigerator to get something cold, or not to be able to wash your clothes, or to be able to call someone is a hard way to live in today's time. Or to expect that your children are going to do their homework by a lantern is difficult to conceive in this day and time.

I would like to just end by talking a little bit about what are the kinds of things that you can do to change the situation, and as you can see, we are caught, and most Tribes are caught in a Catch-22 situation. We do not have the money to develop the basic infrastructure, and these are not going to change unless that occurs.

We ask that you look at ways to provide for capital, that you look at ways to provide for additional incentives, tax credits, so that people will want to partner up with the Tribes to bring this much-needed service to the reservations. We ask that with the Lifeline project, that you encourage the local carriers to partner up with the Tribes to get the word out. We are trying to reach those who need it the most, and yet they are not aware that it is available to them, so I ask that you encourage them to do that.

Ask that the FCC put some teeth into the recommendations to provide service to reservations so that there is additional incentive there. We would ask that you look at ways to provide technical assistance. We were at a disadvantage for negotiating with the carrier, as well as for looking at what technology would best meet our needs, and so I ask that you look at ways to provide for technical assistance to Tribes as they look at how they bring telecommunications or access to the Internet to the reservation.

I would like to also ask that you update and improve the data that is available on telecommunications and access to the Internet in Indian Country, and that you have someone who is responsible to oversee that, and someone who is in charge of disseminating information to Congress, the agencies, and the Tribes. And in conclusion, I would just like to say no matter what label you put on it, there still exists a major gap between the technology haves and the have-nots in this Nation for much of Indian country and, in particular, the Yurok Tribe, where the gap does not refer to the difference between having a T-1 line or a dialup modem, but it refers to having a dial tone in your home.

As you may recall, I was recently the president of NCAI, and as such I took it upon myself to develop a policy initiative in the Committee to take a look at the digital divide, which resulted in the publication of "Connected Indian Country: A Tribally Driven Telecommunications Policy." I ask that you consider the tribal-driven recommendations in that, and to seriously give weight to that.

In conclusion, no one today in America should be without telephones, electricity, and I trust that you will not allow for Indian Country to continue to be left out in this technology world.

Thank you.

[The prepared statement of Ms. Masten follows:]

PREPARED STATEMENT OF SUE MASTEN, CHAIRPERSON, YUOK TRIBE

Mr. Chairman, members of both committees, I am Susan Masten, Chairwoman of the Yurok Tribe. I am grateful for the opportunity to testify today of this matter of great significance to our tribe—the lack of telecommunications services on a significant part of our Homelands.

BACKGROUND. The Yurok Tribe, with about 4,300 members, is the largest federally recognized Tribe in California. The Yurok Reservation spans Humboldt and Del Norte Counties and is one of the most rural and isolated areas in Northern California. The Reservation contains approximately 55,000 acres, of which only 3,000 are owned in tribal trust status. The reservation is one mile on each side of the Klamath River from its confluence with the Trinity River, and stretching approximately 50 miles northwest to the Pacific Ocean. The Klamath River is federally designated as a wild and scenic river. Sadly it also has been recently designated as seriously environmentally threatened. Most of the Reservation is a river gorge.

The current Yurok Reservation is small portion of our aboriginal territories, which once included significant portions of the Hoopa Valley, the Redwood National Park and the adjacent National Forests. The Yuroks are a fishing and timber people whose abundant resources had made us quite self-sufficient until the late-nineteenth century. Although we have long been a federally recognized tribe, the Yurok Tribe was not formally organized until 1993 when under inherent tribal sovereignty we adopted a Constitution, that has been recognized by the Department of the Interior, and began the council form of government that I represent today. Also today, we reside on a Reservation, that thankfully is within the places we have been since time immemorial, it is, however, a place without basic infra-structure—roads, bridges, electricity, and telephones.

Due to lack of roads, the Yurok Reservation is divided into separate communities—the Upper and Lower Reservations, named for the flow of the Klamath River. The Lower Reservation is located along busy coastal highway, U.S. 101, where most basic infrastructure services are available. However, the Upper Reservation, the larger land area which contains two public schools, approximately 200 homes, a health clinic and two community centers, lacks basic telephone service, power, safe roads and adequate police and fire protection.

Consequently, the Yurok People in the Upper Reservation live in very bad conditions; conditions fairly unique in modern day America. Even though the high-tech Mecca of the San Francisco Bay Area is just 250 miles south of our Reservation, Yurok children attending the our public schools and our Head Start Center in the Upper Reservation do not have regular telephone service, let alone access to the Internet, and like President Lincoln in the early 19th century they must study by lantern light. It is not surprising that Yurok children often fall seriously behind their peers in educational opportunities.

There is almost no economic opportunity on the Upper Reservation. The unemployment rate in the Upper Reservation exceeds 70 percent and the poverty level is over 90 percent. Although it our homeland, due to the conditions that I have briefly described, Yurok people are often forced to leave the Reservation to seek employment elsewhere.

EXISTING TELEPHONE SERVICE. The Upper Yurok Reservation is not within the franchise territory of any telephone company and has no traditional telephone service. In addition, the topography of the Reservation (as noted previously, a river gorge), combined with its distance from existing cell towers, limits the availability of cellular telephone service within the Upper Reservation to only a handful of locations. Radio-telephone service, which consists of two-way radios that are trunked to

the publicly switched telephone network, is available to subscribers. However, radio telephone service is not private (radio signals can be picked up by any other subscriber to the service as well as any police scanner), so the schools, clinic, and Tribal Office cannot use this system to conduct private or confidential business. Perhaps, more importantly, radio-telephones are significantly affected by weather and do not work when it is foggy or cloudy—conditions that occur on a regular basis in this area and therefore are unreliable. Other than radio-telephone and extremely limited cellular telephone service, there is no other means of modern communication for residents of the Upper Reservation.

In an effort to help and protect its Members, the Yurok Tribe has worked to establish telephone service in the upper Reservation communities. In 1995, our Planning and Community Development staff members contacted the California Public Utilities Commission (“PUC”) to explore options for the provision of telephone service on the Upper Yurok Reservation. The PUC recommended that the Yurok Tribe contact providers of such service in the area. Accordingly, we contacted both local providers, GTE and Contel, concerning telephone service to the upper Reservation. Both telephone companies stated that it was not *economic* for them to extend service to the Upper Reservation. These telephone providers did however provide service to similar small communities in the surrounding areas. Since that time, GTE has combined with Contel and is now known as Verizon.

Verizon continues to provide telephone service to Indian and non-Indian communities that surround the Upper Reservation but not to the upper Reservation. Verizon provides telephone service to the communities of Hoopa and Willow Creek just south of the Yurok Reservation, the community of Klamath on the Yurok Reservation to the northwest, and the community of Orleans to the north. The Yurok Reservation is surrounded by isolated and rural communities with identical geography and similar population densities, although not necessarily all Indian. The Yurok Tribe continues to encourage Verizon to establish telephone service to the Upper Reservation Indian communities of Weitchpec, Ke’pel, Sregon, Pecwan, and Wautec.

In fall of 2000, the Yurok Tribe intervened in an application before the California Public Utilities Commission (CPUC) that sought the approval of a sale of Verizon service areas to Citizens Communications. This sale included all of the Verizon service areas around the Upper Yurok Reservation. The Yurok Tribe stated in its intervention petition that it was in the public benefit to make extension of basic telephone service to the Upper Reservation a condition of this Verizon sale. The Tribe successfully convinced the CPUC that the serious health and safety risks and economic disparities associated with lack of telephone service to the Upper Reservation would continue unmitigated without action by the CPUC. The CPUC included numerous conditions requiring the extension of service to the Upper Reservation in its Decision approving the sale. However, due to other factors, including recent economic uncertainties and the slowdown in the telecommunications industry, the sale was not consummated.

At this time, the Yurok Tribe and Verizon are engaged in good faith and confidential discussions, which we hope, will result in at least some of the telephone service issues being resolved.

EFFECTS OF NO TELEPHONE SERVICE. Even though most of the areas surrounding the Yurok Reservation have basic telephone service, residents of the upper Reservation have no telephone service and no access to the Internet. Unlike all other locations surrounding the Yurok Reservation, children attending schools on the Yurok Reservation are denied access to the Internet as an information source and learning tool. As a result, all other children in the area, except the children enrolled in public schools on the upper Yurok Reservation, have the opportunity to develop the crucial Internet skills that will be expected of them by future employers. The Upper Reservation children do not have computers in their homes to assist in homework assignments or to help them do research on the Internet. This lack places them well behind other youth in many areas, including in college admission and seeking higher education. In addition, residents of the upper Reservation have no access to distance learning opportunities. Specifically,

- Approximately 180 households, a General Store, several small businesses, and three churches on the Yurok Reservation have no basic telephone service;
- Two public schools with approximately 90 students are without basic phone service or access to the Internet;
- One Head Start Center, supporting approximately 30 children and their families, is completely without phone and Internet service;

- Two Community Centers are without telephone service and, therefore, have no communications link with other Tribal offices and cannot provide badly needed Internet based community resources.

Public Safety. The Yurok Tribe formed a Public Safety Department in 2001. The direct delivery of public safety services by a Tribal department is a tremendous advancement for the Tribe. However, upper Reservation residents still do not have the ability to contact the police directly in the event of an emergency. The lack of telephone services compromises the ability of the Public Safety Department to protect the Reservation.

Because of the distance between most of the upper Reservation communities and emergency first-responders (the California Department of Forestry and Fire Protection in Elk Camp near Orick and the Humboldt County Sheriffs Substation in Hoopa), the lack of reliable telephone service poses a significant health and safety risk to residents in the event of an emergency. Initial contact with a 911 operator is a crucial element of an emergency response. Pre-arrival 911 instructions could provide guidance that could allow a family member or other by-stander to stabilize an injured person in the two-hour plus period between the accident and the time emergency services arrive at an accident in the upper Yurok Reservation area. Because of the lack of a telephone utility, upper Reservation residents are not able to contact 911. The elderly and disabled residents do die as a result of delays in accessing emergency medical treatment.

The Yurok Tribe has received a grant from HUD to construct two fire stations in the Upper Reservation. In addition, the Tribe and the residents of the Upper Reservation have combined to form the newest fire department in the nation. However, even with the addition of the new fire stations and a fledgling fire department, the lack of telephone service prevents residents from reporting fires and other emergencies. Without telephone service, the fire department is unable to provide early intervention in the event of a house fire, and instead must only work to prevent the fire from spreading to adjacent houses.

Medical. Because there is no reliable or secure telephone service available to the Upper Reservation, the United Indian Health Services (UIHS) Clinic, our local tribal consortium that contracts with I.H.S. to deliver health services, located at the Weitchpec Community Center is unable to operate as it was intended—as a functioning health clinic staffed by medical professionals. UIHS requires that, if no doctor is present onsite, staff must be within regular contact by telephone. But, because there is no telephone service between the Clinic site and Weitchpec and other UIHS facilities, the other staff cannot effectively staff the Clinic unless a doctor is present. Therefore, UIHS cannot effectively provide medical services at the Clinic. Instead, the Clinic will only be operated approximately two days per month when a doctor can be present until regular telephone service is available.

Economic Development. The unemployment rate on the Upper Reservation is approximately 70 percent and the poverty rate exceeds 90 percent. Although many residents are gifted artisans they are unable to effectively market their products because of the lack of telephone service and access to the Internet. The Yurok Tribe is dedicated to providing economic opportunities on the Yurok Reservation to encourage Tribal members to return to and remain on the Reservation. “Cottage industry” or home-based “e-commerce” businesses are not available to residents of the upper Reservation. Further, Yurok Tribal members living on the upper Reservation cannot take advantage of federal procurement preferences available to American Indians because the federal government requires businesses to have the ability to transact business via electronic commerce.

In addition, the Yurok Tribe cannot attract businesses to locate in the upper Reservation due to the lack of telephone service. Without telephone service, only the most primitive economic activities are viable in the upper Reservation. Although these are important activities to the Yurok Tribe, they will not result in the economic development necessary to improve conditions on the Yurok Reservation.

Housing Development. Developing new housing within the Upper Reservation is a priority for the Yurok Tribe and the Yurok Indian Housing Authority. Without basic telephone service, power, and adequate roads, and few if any nearby economic opportunities, it is difficult to justify constructing such housing. Further, without new housing construction and any promise to develop the basic building blocks of Upper Reservation communities, it will be impossible to encourage Tribal Members to return and difficult to retain those already there. The trend threatens the future existence of these critical Upper Reservation communities—communities that are closely linked to traditional Yurok life-style and culture.

ISSUES AFFECTING THE EXTENSION OF TELEPHONE SERVICE. Telephone service has not been extended to the Yurok Reservation because this portion

of the Reservation was never included within the franchised area of a telephone company. In addition, it is very costly to build the facilities required to provide service to this area. Providers believe that there would be little financial return on the investment to provide telephone service. To make matters worse, the roads on the Upper Reservation are all single-lane and are without sufficient rights-of-way to accommodate widening to a standard roadway cross-section. The roads are so narrow, including a 21-mile one-lane State of California Highway (State Route 169), that the roads may not be able to safely handle the addition of a utility pole at the road's edge. Further, there is no utility grade power available to operate the switching facilities that will be required to support telephone service at locations such as Jack Norton School, the Ke'pel Head Start Center, and the Judson Brown Community Center.

To facilitate the construction of telephone lines to serve the Upper Reservation communities several things should happen in tandem. First, the Upper Reservation should be included within the service area of a telephone company that has the means and motivation to provide service. Federal and State universal or *High-Cost* should be available, and perhaps increased, to make the provision of high quality telephone service to the Upper Reservation feasible. Further, the federal government should provide funding to support the extension of power lines as well as the widening of existing roads to unserved upper Reservation communities to ensure that reliable telephone service can be made available safely. If roadway improvements are constructed concurrently with telephone and power line installation, significant cost savings can be realized. At a minimum, power and telephone lines should be installed simultaneously, because the cost of installing either one at a later date is significantly higher.

Thank you for this opportunity to testify.

Chairman INOUE. Thank you very much, Ms. Masten.

We have been advised that a vote is on right now, but before I call upon the next witness, may I recognize Senator Cleland.

**STATEMENT OF HON. MAX CLELAND,
U.S. SENATOR FROM GEORGIA**

Senator CLELAND. Thank you very much, Mr. Chairman. Just very quickly, with no objection I would like to enter my complete statement in the record.

Chairman INOUE. Without objection.

Senator CLELAND. Ms. Masten, you make a key point here on overcoming the digital divide. I have some legislation in this very Committee to facilitate that in terms of minority-servicing institutions which would include tribal colleges and universities. I was shocked when we had a young man from the Navajo Nation in Arizona indicate that only 28 percent of people on his reservation had telephones. That was quite shocking to me, so I am very much in sympathy with the panelists here, Mr. Chairman, and I am glad you are holding the hearing.

Thank you very much, sir.

[The prepared statement of Senator Cleland follows:]

PREPARED STATEMENT OF HON. MAX CLELAND,
U.S. SENATOR FROM GEORGIA

I want to commend the Commerce and Indian Affairs Committees for holding this important hearing today. Almost three months ago, the Commerce Subcommittee on Science, Technology, and Space held a hearing on the so-called "Digital Divide" at America's Minority-Serving Institutions—our Tribal Colleges and Universities, Historically Black Colleges and Universities, and Hispanic-Serving Institutions. At that hearing we heard compelling testimony that a distinct disparity exists in computer and Internet use among students in this country who are of different racial, ethnic, and income backgrounds. The case was made, by some, that American Indians are the ethnic group most likely to be caught on the wrong side of the digital divide.

In fact, Richard Williams, director of the American Indian College Fund, has said, and I quote: "the digital divide in Indian Country is like a canyon."

Testifying at that February hearing was Dr. Gerald Monette, President of Turtle Mountain Community College in North Dakota and Chairman of the Technology Committee at the American Indian Higher Education Consortium. Dr. Monette shocked many of us in that hearing room when he stated that less than 50 percent of homes on Indian reservations have telephones. Less than fifty percent—less than half—and this is compared to 95 percent of homes nationwide. Dr. Monette gave us other compelling statistics at that hearing: Less than 10 percent of American Indian households have computers. No more than 8 percent of all American Indian homes have access to the Internet. Only one tribal college currently has funding for high-band width connectivity, but it is not in place yet.

The good news is that Dr. Monette also talked about efforts being taken by the Native American community to turn this situation around. He talked about the historic Circle of Prosperity conference called two years ago, where for the first time ever local, national and international stakeholders were called together to develop strategies to bring modern technology to remote tribal colleges and reservations. Dr. Monette told us about Bay Mills Community College, located in a refurbished fish plant in Michigan's Upper Peninsula, which is using technology and distance learning to deliver higher education to all 11 tribes in Michigan and to people in 17 other states, from Florida to Alaska. He told us about a wireless technology pilot program at 4 tribal colleges which will eventually weave a high-speed broadband web around all of the 32 tribal colleges and universities as well as the reservations they serve.

So I'm looking forward to today's hearing. I want to hear about the digital opportunities that exist to ensure that Native American communities are fully included in this nation's prosperity. I also want to hear the response of our panelists to S. 414, legislation which I have introduced and which is cosponsored by 14 Senate colleagues, to provide up to \$250 million to help Tribal Colleges and Universities, Historically Black Colleges and Universities, and Hispanic-Serving Institutions bridge the digital divide. Funds provided under S. 414 could be used for such activities as campus wiring, equipment upgrade, technology training, and hardware and software acquisition. Under my bill, Minority-Serving Institutions could compete for funds regardless of where they are on the "technology spectrum." The language would allow funding, regardless of whether the college is seeking basic connectivity or upgrading an existing system to dramatically increase its connectivity speed rate. Again, I commend the chairmen of these two committees for calling today's hearing. I want to hear our panelists' recommendations on how we can meet the challenge which Dr. Monette posed to the Commerce Committee three months ago—the challenge of "building a bridge of technological opportunity across our vast nation."

Chairman INOUE. Thank you very much.

I will recognize Ms. Warren Edelman. She represents S.M.E., president and former Senior Policy Advisor to the Secretary of Commerce for Native American Affairs. Ms. Warren Edelman.

**STATEMENT OF MARCIA WARREN EDELMAN, PRESIDENT,
S.M.E. LLC AND FORMER SENIOR POLICY ADVISOR TO THE
SECRETARY OF COMMERCE FOR NATIVE AMERICAN
AFFAIRS**

Ms. WARREN-EDELMAN. Good morning, Mr. Chairman and Members of the Committee. Thank you very much for inviting me to testify today on this very relevant and urgent issue.

Chairman INOUE. Ms. Warren—

Ms. WARREN-EDELMAN. Yes.

Chairman INOUE. Could you bring your microphone closer?

Ms. WARREN-EDELMAN. Thank you. Is that better?

Again, thank you for inviting me to testify this morning. I am pleased to come before the Committee today to provide a broad perspective on telecommunications access in Indian Country. I come to this hearing with my background at the Department of Commerce, where I did work on issues relating to closing the digital divide in Indian Country, as well as the coauthor of a report published by

the Benton Foundation in 1999 entitled, Native Networking, Telecommunications and Information Technology in Indian Country.

I would like to relate a little bit of my experience when I first did that report. I started to do the research for that for a telecommunications company I was employed by. They needed a market assessment on telecommunications in Indian Country, and I started out doing the research assuming that there would be data, and that there would be plenty of information for me to put together such a report. To my great surprise, there was none.

The only report that was in existence at that time was the Office of Technology Assessment Report from 1995, which provided what little information we had on tribal communities and their efforts to access basic telephone service, the Internet, and other telecommunications services and products in order to provide for cultural preservation, health, and education needs.

Since that time, we have been fortunate to have not only the Benton Foundation report but also two reports, both from the Department of Commerce, released in 1999, one from the National Telecommunications and Information Administration, and also the other one from the Economic Development Administration, which focused on this issue. However, information since that time has not been forthcoming, has not been updated nor accurate.

I believe that this particular situation in Indian country again is urgent, it is severe, we have heard many personal experiences related today, I have heard them over the past few years. I think from what I have heard, and the little bit of data that we have been able to gather, we can point to three particular areas of need that can be addressed in either current proposed legislation or Federal programs that are already in existence, and some that may need our support.

I would say three issues, lack of current and accurate information, which you have already heard quite a bit about today, lack of ongoing coordination of resources is another major need area, and the third one, lack of investment capital and technical assistance. All three contribute to the environment that we see today.

As I mentioned before, we did have three reports coming out in 1999. Nothing new has come through, except for the report that holds policy recommendations from NCAI, and I concur with Chairwoman Masten to look at those results and really take into consideration those recommendations, but in terms of baseline data what we are looking for is more than just policy recommendations. We are looking for baseline information that measures not only telephone access, but also existing tower locations.

I remember one conversation I had with a woman from the Navajo Nation trying to find what existing towers existed on their tribal lands, and there was no data that she could find to that effect, and that was months and months of looking for that, and that was unacceptable.

Secondly, the type of technology currently utilized or might best be utilized, either wireless, versus satellite, versus whatever technology is out there, that should be examined closely. And Internet access, which is quite important. Any new studies must also take into consideration the differences in Indian Country, and I am talking about large, land-based Tribes versus Tribes that are close to

urban locations that might have easier access to some of those services.

We all talk about how each Tribe has very specific and varying degrees of connectivity. That should be taken into consideration with any studies that occur.

The results of such studies would not only provide, I think, Federal agencies and also Congress with the data that is needed to fully support any legislation or programs in place, but also would provide Tribes with the means to justify business cases, which would increase either investment from the outside into these communities, or in their own ability to create infrastructure to be able to get loans, to be able to get the means in order to create the infrastructure that is so badly needed.

The second point I was making, lack of ongoing coordination of resources, I have to commend all the organizations, both Native, Federal, private foundations, all of those that have been involved over the past, I would say 7 to 10 years, in really, looking at the digital divide if you want to call it that, or the gap in technology access. But all these efforts have been not well coordinated in terms of getting actual connections between Tribes, the foundations, the businesses, the Federal programs that can really come together to put together comprehensive efforts that would meet this need.

Tribes cannot be expected to do this alone. The cost of infrastructure, especially telecommunications infrastructure, is high, and it is ongoing. This is not a field where it is going to end within 2 years in terms of costs. These are ongoing costs that Tribes need to consider.

I would support, and I would encourage the Committees to consider supporting the creation, like Chairman Masten was saying, of either an individual program or such organization, and I would have to say probably outside the Federal sphere, to coordinate these resources, information, also provide research, any kind of analysis and coordination that is possible to help Tribes and the businesses and the foundations and the programs that are interested in helping them come together effectively.

The third area, lack of investment capital and technical assistance, as I said before, telecommunications equipment, products, and services are an expensive business. It requires money. Tribes cannot do it all alone. From my experience at the Department of Commerce, I could point you towards the direction of some programs that were highly effective. The first one would be the technology opportunities program. Since 1994, it has funded over 18 tribal projects that are serving as models within Indian Country.

In fiscal year 2001, the program provided \$4.2 million to tribal communities throughout the Nation, a record amount. I would highly support this program as being effective and being innovative in how it helps Tribes form partnerships on the ground, is responsive to a grassroots-level planning process that results in, I believe, long-term successes in Indian Country.

Also within the National Telecommunications and Information Administration is the public telecommunications facility program, which funded the American Indian Higher Education Consortium

satellite-based distance learning network which serves 31 tribal colleges today.

As part of the Department of Commerce over the past 3 years, I was very proud of this program. However, there is still a need, even though the tribal colleges are connected through the satellite distance learning network, again we are talking about the last mile technology. For those people that cannot get to the tribal colleges there is nothing in between the tribal college and either home or community centers or offices of some sort. And I am talking about another kind of technology that can bridge that gap, that can bring the educational benefits of those tribal colleges being linked together to them. I would encourage the Committees to take a look at that particular issue.

The Department of Agriculture's rural utility service has provided loans to five tribal entities to create tribal telephone companies, again a very important factor in closing the gap in tribal communities, and the Economic Development Corporation again under Department of Commerce has provided much-needed funding for planning for these Tribes in order to incorporate technology and telecommunications into the economic development plans.

Again, as I have mentioned, a number of private foundations have worked with Tribes in order to close this gap. I would refer you to a Web site, www.digitaldivide.com, for more information on these joint partnerships and programs. However, the fact remains that Tribes need access to capital, really need access to capital. Funding from Federal programs is very much needed, but I would stay focused in the area not only in building up infrastructure, but planning. Planning is essential. There is not enough money for planning out there, period. From planning and needs assessments, each Tribe can then take a look at where capital should be funneled towards in terms of technical assistance, development of last mile telecommunications systems, equipment purchase and maintenance, pilot programs and projects which are again essential in terms of bringing new technologies out to Indian lands, and actually seeing if they work, and also seed capital for telecommunications and information technology business development.

I would also encourage that the Federal Communications Commission continue to maintain an active and ongoing relationship with Tribes. I am encouraged to hear that the Indian Telecom Training Initiative has not disappeared along with the annual conference, which I do have to say, the first one was quite successful and was the only conference to date that I know that was able to bring together over 500 representatives from Indian Country to speak about this one issue. I was happy to actually be part of that. It was a fantastic conference.

I think FCC really does need to take a look at any existing regulatory barriers and really focus on supporting in-house their tribal liaison. Whoever that person may be really needs to have the support of the FCC fully and be able to provide the best information to the Tribes as they need it, and really keep that level of responsiveness immediate and ongoing.

Lastly, I believe a vehicle must be created to encourage outside investment in our tribal communities, either through loan funds, investments, joint partnerships. One source of capital is not

enough, never enough to address this issue, especially in the consideration of the importance of the long-term nature of telecommunications access.

In conclusion, I would like to commend both Committees for addressing this issue. We have been talking about it for many, many years, both on the Federal side, Congressional side, and Indian Country. I cannot emphasize enough that the talking needs to stop, and action needs to happen now. We are falling way behind. Economic development needs to happen for our communities. It cannot happen without infrastructure, and Tribes need to have all barriers removed toward achieving that end, and all the support we can give in order to do that.

As a member of Santa Clara Pueblo in New Mexico, this hits home for me, and as a person that has worked with fantastic Tribes and very dedicated individuals in this issue, I can really say that I believe in this issue and I would be happy to help in any way possible.

Thank you, and I look forward to answering any questions you may have.

Chairman INOUE. Thank you very much, Ms. Warren Edelman, and Mr. Strand.

[The prepared statement of Ms. Warren Edelman follows:]

PREPARED STATEMENT OF MARCIA WARREN EDELMAN, PRESIDENT, S.M.E. LLC AND FORMER SENIOR POLICY ADVISOR TO THE SECRETARY OF COMMERCE FOR NATIVE AMERICAN AFFAIRS

Good morning, Chairman Inouye, Chairman Hollings, Vice Chairman Campbell, Vice Chairman McCain, Members of the Committee, tribal representatives and leaders, and distinguished guests. Thank you for the opportunity to present testimony today on this very important issue in Indian Country.

My name is Marcia Warren Edelman and I am the President of S.M.E. LLC, a consulting firm that provides strategic planning and business development services in the areas of Native American policy, economic development, and telecommunications and information technology. From 1999 to February of this year, I served as the Department of Commerce's Senior Policy Advisor to the Secretary for Native American Affairs where I had the opportunity to work on a number of issues and initiatives, including the Department's focus on closing the Digital Divide. I am also the co-author of "Native Networking: Telecommunications and Information Technology in Indian Country," a policy report and resource manual published by the Benton Foundation in 1999.

I am pleased to come before the Committees today to provide a broad perspective regarding the impact of the lack of telecommunications access to tribal nations, as well as to discuss a number of solutions that have been proposed to address this serious need.

As you have heard during the course of today's hearings, the lack of telecommunications access in Indian Country is urgent and severe. Based on the statistics and information related from tribal communities across the nation, it is clear that the infrastructure needed to support connectivity for every Indian individual in his or her home or community continues to remain, for the most part, unavailable and unaffordable. Three reasons can be cited as contributing factors to this situation:

- Lack of current and accurate information
- Lack of ongoing coordination of resources
- Lack of investment capital and technical assistance
- Lack of current and accurate information

In 1999, three reports were published which examined the state of connectivity in Indian Country. All three found that Native Americans face an urgent situation where current infrastructure capabilities fall far behind that of the United States, threatening the economic, educational and cultural self-sufficiency of tribes and their communities.

“Falling Through the Net: Defining the Digital Divide” published by the Commerce Department’s National Telecommunications and Information Administration (NTIA) found that:

- For telephone penetration, rural Native American households (76.4%) rank far below the national average (94.1%).
- Rural Native American households’ access to computers (26.8%) is also lower than the national average (42.1%).
- Overall, Native Americans are also behind in their access to the Internet (18.9%), compared to the national average (26.2%).

The Economic Development Administration (EDA) supported these findings in their report, “Assessment of Technology Infrastructure in Native Communities,” with similar data and identified the dilemma faced by many tribes in this area:

“Today, many Native communities find themselves in a vicious circle. The weak economic base of these communities makes it difficult to support infrastructure investment. And in turn, the poor state of infrastructure undermines their ability to undertake and attract successful economic development initiatives.”

Finally, the Benton Foundation’s report, “Native Networking: Telecommunications and Information Technology in Indian Country,” provided not only an effective guide to the policies and resources affecting tribes, but also presented the following challenge:

“Tribes must begin at home to define the needs and goals important to their communities, and then reach out and forge the relationships necessary to achieve those goals. As well, federal agencies, foundations, businesses and policy makers must include tribes and Indian people in their scope of telecommunications and technology growth and opportunities. Only then, when these two spheres meet and a new network of relationships is created, will the mandate of the Information Superhighway truly be fulfilled.”

Since 1999, the only new information that has been published on telecommunications access and policy in Indian Country is the July 2001 report by the National Congress of American Indians (NCAI) entitled, “Connecting Indian Country: Tribally-Driven Telecommunications Policy.” NCAI, under a grant from the AOL Foundation, created the NCAI Digital Divide Task Force in 2000 with the purpose of providing a forum for tribal leadership to address the top policy issues regarding telecommunications policy in their communities and on a national level. The report brings together the findings of the Task Force under four priority areas: access; economic development, workforce training and education; content; and sovereignty. I would like to refer the Committees to review this report on www.indiantech.org or www.ncai.org, and consider the action items and specific policy changes recommended by the tribal leaders and representatives that served on the Task Force.

However, as important as policy discussions may be, it is imperative that current and accurate baseline data is obtained to fully measure the current status of telecommunications access in Indian Country. Currently, no new such data has been gathered or compiled, even though the 2000 Census has been completed and the National Telecommunications and Information Administration (NTIA) has published two more reports in the Falling Through the Net series—both without data on American Indians and Alaska Natives (due to inadequate sampling size of existing data).

Accurate statistics are extremely important, not only to measure the telephone penetration rates of our tribal communities, but also to identify other indicators of telecommunications access such as existing tower locations, the type of technology currently utilized (wireless vs. landline), and Internet access. Any new studies must also take into consideration the differences in Indian Country (large land-based tribes vs. reservations near urban areas) and it must continue to track this information consistently. The results of such a study would in turn provide federal agencies, businesses and tribes with the support needed to develop funding programs, strategic plans and viable business cases.

I encourage the Committees to identify the means to perform comprehensive and ongoing studies in order to update the 1999 information presented in the reports listed above.

Lack of ongoing coordination of resources

To this date, a number of Native organizations, federal agencies, businesses and non-profit organizations have been actively involved in addressing the issue of telecommunications access in Indian Country. All of their efforts deserve recognition for

the excellent work that has been done to close the gap. Unfortunately, there has been no single organization that has provided coordination between these groups and/or served as a voice for advocacy, policy recommendations and resource coordination.

I encourage the Committees to consider supporting the creation of a national-level program or organization housed outside the federal government focused on promoting equal access to, and the appropriate use of, telecommunications and information technologies in Indian Country through coordination, research, analysis, the dissemination of information and federal policy advocacy.

Lack of investment capital and technical assistance

Telecommunications equipment, products and services are an expensive business. For many tribes, it is simply a luxury they cannot afford. In many cases, members of tribal communities cannot call relatives away at school or work, cannot call 911 in an emergency, cannot create a new business for lack of telecommunications infrastructure, cannot access online information that the rest of the nation takes for granted. "E-government" does not exist and cell phone coverage stops at reservation borders. This situation is unacceptable and tribes should not be expected to provide the funds to address this situation alone.

Fortunately, there exist a number of federal programs that have been able to work with tribes to begin addressing this issue:

- The National Telecommunications and Information Administration (NTIA): NTIA has helped to extend the benefits of information and communications technology to American Indian and Alaska Native communities through two grants programs, the Technology Opportunities Program (TOP) and the Public Telecommunications Facilities Program (PTFP). TOP provides matching grants to non-profit entities, tribal, state and local government, and since 1994 has funded over 18 tribal projects that are serving as models within Indian Country. In FY 2001, the program provided \$4.2 million to tribal communities throughout the nation, a record amount. PTFP has made a significant contribution to the public broadcasting system in Indian country by providing matching grants to over 40 tribal communities throughout the United States for the planning, construction, and replacement of outdated public radio and television equipment. In addition, PTFP funded the establishment of the American Indian Higher Education Consortium (AIHEC) satellite-based distance-learning network, which serves 31 tribal colleges.
- The U.S. Department of Agriculture's Rural Utility Service (RUS): RUS has made loans to five tribal entities to create tribal telephone companies, including the Gila River Telephone Company, Tohono O'odham Utility Authority, Fort Mojave Telecommunications, Cheyenne River Sioux Telephone Authority, and San Carlos Apache Telecommunication Utility. Together, these companies now provide service to approximately 8,000 Native American subscribers. In addition to loans, the RUS also provides technical assistance and counseling in formulating development plans.
- The Economic Development Administration (EDA) has provided much-needed funding to a number of tribes for planning and economic development that focuses on and/or utilizes telecommunications and information technology.

In addition, a number of private foundations are working in partnership with tribes and businesses to create infrastructure, access to hardware and software, and technical assistance for telecommunications needs in Indian Country. I encourage the Committees to access www.digitaldividenetwork.com for more information on these projects.

However, the fact remains that tribes need access to capital in order to significantly impact the current lack of infrastructure so common in their communities today. Funding from federal programs is imperative for all areas of telecommunications access, but most especially for planning and needs assessments, as each situation of each tribe is unique does not necessarily apply to all tribal communities. Based on the accurate determination of needs and goals, capital can then be applied to other priority areas such as:

- technical assistance
- development of "last mile" telecommunications
- equipment purchase and maintenance
- pilot programs/projects

- seed capital for telecommunication and information technology business development

In addition, it is essential for the Federal Communications Commission (FCC) to maintain an active and ongoing relationship with tribes to examine any existing regulatory barriers that may exist, as well as identify programs and successful models to increase telecommunications access in underserved communities.

Lastly, a vehicle must be created to encourage outside investment in our tribal communities, either through loan funds, investments, joint partnerships, etc. to work in conjunction with federal and private funding. One source of capital is not enough to address this issue, especially in consideration of the importance and long-term nature of telecommunications access.

I encourage the Committees to support existing or proposed legislation that facilitates increased access to capital for telecommunications infrastructure development and maintenance, planning and business development.

In conclusion, I would like to commend the Committees for holding this joint hearing on tribal telecommunications issues and I look forward to seeing the creation of legislation that will address this issue, which is of great relevance and importance to tribal nations throughout the country. Thank you for your invitation to testify, and I welcome any questions you may have.

**STATEMENT OF MICHAEL STRAND, EXECUTIVE VICE
PRESIDENT & GENERAL COUNSEL, MONTANA
INDEPENDENT TELECOMMUNICATIONS SYSTEMS**

Mr. STRAND. Thank you very much, Mr. Chairman. Good morning.

I would like to thank the Committees for allowing me this time to offer my observations with respect to the deployment of basic and advanced telecommunications services to Native Americans. I represent five small rural telephone companies operating in Montana. They range in size from about 5,000 lines to about 10,000 lines. Their service areas include four Indian reservations, the Fort Peck, Fort Belknap, Rocky Boy, and Crow.

Our reservation areas are a challenge for us. Our most current information is that the average per capita income on the reservations we serve is approximately \$8,000 per year. Many residents, particularly the elderly, do not speak English; many others have lived their entire lives without telephone service, and are not interested in the service regardless of price; and finally, there is an understandable mistrust of programs and projects offered to them by non-Indians.

Like many small rural telephone companies around the country, we acquired the bulk of our reservation exchanges from the local Bell Operating Company in the last 10 years. To give you an example of how that has worked, I will focus on the experiences of one of our companies, Project Telephone Company. I think a lot of the things that Project has done will be instructive and valuable as other companies look at how to increase penetration on their reservations. Project purchased all but one of the telephone exchanges on the Crow Indian Reservation from U.S. WEST in 1994. Telephone service to the Crow at that time was abysmal. Subscribership was approximately 50 percent. The equipment and facilities were antiquated, and customer service was practically nonexistent.

Upon purchasing U.S. WEST's assets in the area, Project immediately invested \$2 million in new digital switching equipment, fiber optics and new copper plant. We implemented new construction policies so that any home or business located within 1 mile of

one of our lines could get service with no construction charges. Formerly, many Crow had been told they would have to pay thousands of dollars to get telephone service. We hired all Crow-speaking customer service representatives and field technicians to do telephone hookups. A tribal member was appointed to our board of directors. We made dialup Internet access available to every customer, and we made high-speed Internet access using DSL technology available to two-thirds of the tribal members. We expanded the local calling area so the reservation could call Montana's largest city without incurring toll charges. This is important because many tribal members lose their telephone service for nonpayment of long distance charges.

Finally, we aggressively pushed the enhanced Lifeline and Link-Up program to those who were eligible. Of the 1,423 residential lines in our service area on the Crow Reservation, 490, or 34 percent of the lines are currently involved in the enhanced Lifeline program that makes local service available for \$1 per month. This is a critical program. As we have traveled around the country talking to other Native American groups, we found that many of them think that this program is unique to Project Telephone Company. Clearly, telephone companies across the country are not making their reservations well enough aware that this program exists.

Well, not surprisingly, subscribership grew. In the 8 years since we acquired the exchanges on this reservation, it has increased from 50 percent to nearly 85 percent, and continues to grow.

I mention Project's experience, because it underscores a fact that I think is little known in Washington today. Many reservation areas around the country have been sold to companies like Project in the last 10 years. When the Bell Companies owned these areas, their requirements for return on investments simply provided them no incentive to provide service to the reservations, but for companies like Project, that only had 4,000 lines to begin with, reservation areas are simply not that different from the rural areas they already serve.

Before any significant changes in Federal policy occur with respect to phone service and the reservations, I would like to call upon Congress and the FCC to ensure that they are fully aware of the accomplishments of companies like Project so that their policies do not undermine those efforts. I think this point dovetails nicely with the testimony you have already heard that the current information out there is hopelessly out of date. The 1990 Census information that Senator McCain mentioned is out of date for all of the reservations with which I am familiar.

I understand the central theme of this hearing is ETC designation. I would like to make a couple of points in that regard, and then I would be happy to answer questions at the appropriate time.

Our companies operate one of the most successful cellular operations in the State of Montana. It is called Sagebrush Cellular, and we have tremendous coverage. We have taken a saturation approach to tower siting so that we cover not just the main highways but also the secondary roads, making it very popular with farmers and ranchers in Montana.

While we love wireless technology for specific applications, we are very skeptical as to its suitability as a universal service offer-

ing in most cases. The wireless service we have seen deployed in rural areas is not nearly as reliable and robust as wire line service. Wireless service is subject to congestion problems because of a lack of communications channels built into most systems. It has very poor redundant power supply in the event of an extended power outage. It is subject to distortion, fade, or outright blocking, depending on the frequency used. It has problems with weather conditions and line of sight issues. With very few exceptions, it provides incredibly slow and unreliable connections to the Internet, and finally, very few wireless providers offer their customers a choice of long distance service. In rural areas, where incomes are low, folks need to be able to shop around for the best deal on long distance.

That said, if there is no traditional wire line provider that is willing to provide true universal service to a reservation area, then by all means wireless should be used to keep those folks connected to the national network.

The other point I would like to make is that current FCC policy with regard to ETC designation needs to be fundamentally reviewed. There are three very significant problems with it. The first is that the FCC's policy is to give competitive ETC's the exact same support per line as the incumbent ETC, based on the incumbent's cost of providing service. This policy will inevitably drive service quality in rural America to a lowest common denominator, because the FCC does not require the competitive ETC to match the incumbent in terms of service quality.

The second point is that when the FCC decides to take up an application for ETC designation itself, rather than leaving the decision to the State commission, the FCC lacks the investigative tools to make an informed decision. The competitive ETC files an application with the FCC. Interested parties file comments, and the application is either granted or denied. There is no hearing. There is no discovery. There is no opportunity for cross-examination.

ETC designation is an extremely important decision. The FCC needs to make certain that the representations made in a competitive ETC's application are true. If not, when a natural disaster strikes and the phones do not work, someone is going to get hurt.

The FCC is not the appropriate decisionmaker with respect to ETC designations on reservations. Where the reservation has a well established public utility commission of its own that has experience regulating rates and service quality, it is in the best position to determine what is best for the reservation. Where the State public utility commission has historically taken on that role, it is in the best position. The FCC is simply too far away, and its investigative processes are too limited to make such important decisions.

Thank you for this opportunity to express my views, and I would be happy to answer questions.

[The prepared statement of Mr. Strand follows:]

PREPARED STATEMENT OF MICHAEL STRAND, EXECUTIVE VICE PRESIDENT & GENERAL COUNSEL, MONTANA INDEPENDENT TELECOMMUNICATIONS SYSTEMS

Good Morning. I would like to thank the Committees for allowing me this time to offer my observations with respect to the deployment of basic and advanced telecommunications services to Native Americans.

I represent five small rural telephone companies operating in Montana. They range in size from about 5,000 lines to about 10,000 lines. Their service areas include four Indian reservations: Fort Peck, Fort Belknap, Rocky Boy and Crow. Our companies are quite progressive, offering DSL services to nearly 60 towns with populations under 2,000.

Reservation areas are a challenge for us. Our most current information is that the average per capita income on the reservations we serve is approximately \$8,000 per year. Many residents, particularly the elderly, do not speak English. Many others have lived their entire lives without telephone service and are not interested in the service regardless of price. Finally, there is an understandable mistrust of programs and projects offered by non-Indians.

We have rigorously reviewed our operating policies and procedures to address these challenges. These efforts have been quite successful, a point on which I will provide greater elaboration in just a moment.

While we are primarily wireline providers, we love the attributes of wireless service for particular applications. Where a customer's primary need is to make a mobile voice communication, there is no better solution than cellular or PCS.

That said, we are far less enamored of wireless as a universal service offering, particularly in rural areas. Our view of a universal service offering is that it is the solid, reliable connection to the national network for people in remote areas. It needs to work in bad weather and when there is a power outage. It needs to work regardless of the vagaries of terrain and line-of-sight. When calling outside their local community, users need to be able to select an affordable long distance provider, and they need to know that they can get a reliable connection to the Internet at a reasonable speed. Generally speaking, wireline service has these attributes and wireless service does not. That is why we continue to believe that wireline service is the best universal service offering in rural Montana.

This brings me to the problems inherent in the current FCC approach to ETC designation.

The first problem is one of process. At the FCC, an application is filed, interested parties can file comments, and the application is either granted or denied. There is no hearing. There is no opportunity for discovery. There is no opportunity for cross-examination.

Why is this a problem? As an example, we operate a cellular company in northern Montana called Sagebrush Cellular. It has *not* applied for ETC status.

Another cellular provider in the same area *did* apply to our state public service commission for ETC designation. The provider claimed to provide service to all locations in the area, which is roughly the size of the state of West Virginia. It has three towers. Sagebrush Cellular has 22 towers, using the same type of equipment and providing the same service throughout the same area. Nonetheless, there are still almost 5 percent of the homes and businesses in the area that Sagebrush does not reach. In our view, the applicant's coverage claims were highly improbable at best.

However, had the application been processed by the FCC, there would have been no opportunity to ask the provider's engineers what miracle they had performed to reach more customers with three towers than we could reach with 22. Fortunately for the area and for the federal Universal Service Fund, the state public service commission's process included such opportunities to delve beneath the surface of the application, and the application was ultimately withdrawn.

Another problem is the FCC's current funding rules for universal service. The FCC's definition of universal service is extremely basic. The companies I represent provide service that exceeds the FCC's definition by a wide margin. To do so, they incur costs. The FCC has decided that a competitive ETC is to receive support based on the incumbent's costs. So a competitive ETC's incentive is to spend just enough on service to meet the FCC's definition and then receive support based on the incumbents costs of providing service. Faced with that situation, an incumbent has little choice but to reduce the quality of its service so it can match the competitor's costs and, by extension, its prices. This drives service quality in rural America to a lowest common denominator. We find this deeply troubling.

The FCC has, in at least one case, decided to preempt state commission jurisdiction with regard to ETC designation on Indian reservations. The Supreme Court has made clear that state law is not to be preempted unless specifically authorized by Congress or where state regulation would interfere with tribes' rights to govern themselves. Congress has not specifically granted the FCC authority over ETC designation on reservations. Further, since the effect of FCC preemption is to move the decision from the state commission to the FCC, this is not a case where the tribe is allowed to govern itself in this regard. The appropriate decision-maker is the state public service commission that has regulated rates and service quality for decades.

On a final note, I would like to briefly describe a company called Project Telephone Company. Project purchased all but one of the telephone exchanges on the Crow Indian Reservation from U.S. WEST in 1994. Telephone service to the Crow at that time was abysmal. Subscribership was approximately 50 percent. The equipment and facilities were antiquated, and customer service was practically non-existent.

Project immediately invested millions of dollars in new digital switching equipment, fiber optics, and new copper plant. We implemented new construction policies so that any home or business located within 1 mile of one of our lines could get service with no construction charges. Formerly, many Crow had been told they would have to pay thousands of dollars to get service. We hired Crow-speaking customer service representatives and field technicians to do hook-ups. A tribal member was appointed to our Board of Directors. We made dial-up Internet available to every customer and DSL available to nearly two-thirds of the tribal members. We expanded the local calling area so the reservation could call Montana's largest city without incurring toll charges. Finally, we aggressively pushed the enhanced Lifeline and Link Up programs to those that were eligible. Of the 1,423 residential lines on the Crow Reservation, 490 (or 34 percent) of the lines are enrolled in the enhanced Lifeline program that makes local service available for \$1 per month.

Not surprisingly, subscribership grew. In eight years, it has increased from 50 percent to nearly 85 percent and continues to grow. Under current FCC rules, if a competitor now decides to file for ETC designation, that competitor will jeopardize the viability of Project's service improvements on the Crow Reservation. Nonetheless, a competitor that meets all of the legal requirements for designation has the right to be designated. We simply believe that the decision-maker should be the state commission that knows the difference between the service that existed before and the service that exists today.

I have tremendous admiration and respect for people I have met at the FCC. There is a lot of brain power over there and their intentions are good. But they cannot fully appreciate the local circumstances in communities 2,500 miles away, and their investigative processes are not designed to allow them to do so.

Thank you again for giving me this opportunity to present my views. I would be happy to respond to questions.

Senator CAMPBELL. Thank you. We will now go to Mr. Stanton.

**STATEMENT OF JOHN STANTON, CHAIRMAN/CEO,
WESTERN WIRELESS CORPORATION**

Mr. STANTON. Thank you, Senator. My name is John Stanton. I am the chairman and chief executive of actually three businesses in the wireless industry, and I originally founded a fourth business. I helped found McCaw Cellular Communications, which is now owned by AT&T Wireless, in the early 1980's. I started a business called Western Wireless, which services 1.1 million customers, almost entirely in the rural United States. Our subsidiary, Western Wireless International, operates in 10 countries outside the United States, ranging from Haiti and Ghana and Cote D'Ivoire to Ireland and Austria, and I founded Voice Stream Wireless, and am still chairman of that company, which was sold to Deutsche Telekom last year.

The purpose of my testimony is to answer the question as to why on certain Indian reservations the tribal members suffer with tele-density rates, or the rates of telecommunication penetration, below those in many Third World countries. The answer to the question as to how to improve service is clearly wireless, as both Senator McCain and Senator Burns suggested, but in many cases that is not available simply because the system today is broken. The system is broken in the that there are legal and regulatory barriers that bar competition from entering and providing services on tribal land. I urge you today to fix the system.

My detailed testimony goes through many of the specific concerns that we have, but I would like to use two examples to tell you what good can happen and what challenges we have faced. In representing our Western Wireless business on a panel chaired by Senator Daschle 2½ years ago, I had the opportunity to discuss, or maybe more accurately debate with the general manager of the telephone company servicing the Pine Ridge Indian Reservation, the quality of telecommunications service. In that hearing, the general manager of Golden West indicated that only 25 percent of the population of the Pine Ridge had telecommunications service because in his view, that was all that wanted telecommunications service. He indicated because the population was poor, because they spoke Native languages, and/or because they were aged, that they did not want telecommunications services. I frankly did not believe it and did not agree with him.

The answer, we believed, was competition, and after an extensive legal process that took us to the State supreme court in South Dakota twice, took us to Federal court, and eventually to the FCC, we were able to get authority to provide telecommunications services on the Pine Ridge.

We launched service about 18 months ago. Today, we serve more customers than that telephone company that has been there for about 50 years. We provide service to over 4,000 residents of the Pine Ridge. We have provided access to telecommunications services to every member and are actively growing our business today. We created jobs through a joint venture agreement with the Oglala Sioux Tribe. We created access to emergency and public services to every tribal member, and we are providing high speed data services on tribal lands.

The second example was an example of the frustration associated with jurisdiction. The Goshute Tribe is located on the Nevada and Utah State border. We have had a terrible challenge in trying to be able to provide service. The State of Nevada granted us Eligible Telecommunications Carrier authority, but failed to provide universal service funding authority. The State of Utah, where most of the Goshute population is located, failed to even grant us Eligible Telecommunications Carrier status. We have gone through a series of processes and attempted to be able to provide service, but frankly, Senator, radio waves do not respect State boundaries. It is essential for us to be able to provide service for the FTC to act, and frankly Senator, in many cases the FCC has been slow to act.

The challenge for us is broader. The 1996 Act, as both Senator McCain and Senator Burns referred to, was intended to bring competition to telecommunications, and it clearly succeeded in general in the wireless industry. Our industry has grown dramatically since the passage of the act. In 1997, the amendment to the Act that Senator McCain referred to was intended to clarify that tribal lands should be subject to FCC authority, but the act and the process that is created by the Act frankly have stifled rather than encouraged competition.

The distinction between rural and nonrural designated areas, where the people with the greatest needs in rural areas have a greater administrative burden imposed on the carriers attempting to provide them with service, has slowed the introduction of serv-

ice. States were made responsible for designating eligible telecommunications carriers and States have been slow to act. My company has spent millions of dollars attempting to litigate over a 4-year period in 14 States. There are some States that have still not acted on our petitions to be granted eligible telecommunications carrier status.

The FCC has also not acted. We have a petition in Mr. Strand's area in the Crow Indian Reservation that has been pending before the FCC for over 2 years. The FCC only acted in the Pine Ridge case where we went through a State supreme court process and got an agreement with the tribal authorities to provide service. Only then were we able to sign a treaty just about 2 years ago.

We have been further challenged in the States by the manipulation of the process by independent telephone companies. The application for eligible telecommunications carrier status is a relatively simple application, and yet in Montana Mr. Strand's organization filed 465 interrogatories against our application. As one of our lawyers put it, it was "death by 1,000 paper cuts."

The challenge for us has been that we have a need to be able to act quickly in order to get a fair return on our investment, and the delay in being authorized as a carrier has delayed the ability for us to implement our services, increased the cost, and frankly made it a more challenging economic proposition. Several States have not created universal service funds which are necessary, as has been described by all the witnesses, in order to overcome some of the economic challenges in certain tribal areas.

Ironically, the telecommunications accounting system even makes it more difficult for tribal areas. The way the telephone accounting allocates costs between long distance and local jurisdictions creates an economic incentive for telephone companies to create very small areas, perpetuating the isolation of tribal lands because the independent telephone companies are incited to create a local service area that only includes the tribal areas and charge long distance in many cases for calling to larger cities.

Lastly, I would like to comment on some solutions that I would encourage the Congress to consider. First, to clarify jurisdiction for Indian country under section 214(e)(6) of the act—that is, the provisions that were amended in 1997, and the FCC has indicated in some conversations with us that there are difficulties, there is a lack of clarity that covers Indian Country.

Second, encourage the FCC to act promptly on Indian reservation eligible telecommunications carriers status. As I indicated, in certain cases we have had an application on the Crow Reservation pending for over 2 years before the FCC.

Third, to take steps to ensure that the support and subsidy systems for telephone companies are open and nondiscriminatory.

Fourth, to require the States to implement competitively neutral universal service policies which ensure that wireless services can compete effectively and fairly against wire services.

Our company is deeply committed to providing services on tribal lands. We do it both because it is the right thing, and because we think it is a good economic proposition for carriers to come in and compete.

Competition represents the opportunity to offer choices to members of tribal communities, the ability to choose between competing carriers. In our experience on the Pine Ridge, the quality of service provided by the independent telephone company, our wired competitor, has actually improved as a result of the introduction of competition. Competition brings the benefit to consumers, and it brings the benefits to the entire community, and we would encourage you to take steps to allow that competition.

Thank you.

[The prepared statement of Mr. Stanton follows:]

PREPARED STATEMENT OF JOHN STANTON, CHAIRMAN/CEO,
WESTERN WIRELESS CORPORATION

Introduction

Mr. Chairman and members of the Committees, I commend you and your colleagues for convening this joint hearing to examine the critically important issue of how best to improve telecommunications service to individuals residing on tribal lands in America. I especially appreciate the opportunity to address a subject that is not only of great interest to these committees, but also a subject that is at the core of the business mission of my company, Western Wireless Corporation.

As we sit here today, more than three thousand members of the Oglala Sioux Tribe on the Pine Ridge Indian Reservation in South Dakota have telephone service, including access to emergency 911 services, in their homes for the very first time because of a unique cooperative arrangement between Western Wireless and the Oglala Sioux Tribe, which can be replicated in other areas of the country only if action is taken to eliminate barriers to universal availability of telecommunications services. In this testimony, I identify the successes and challenges associated with the current system in place to provide universal service to all Americans and what steps need to be taken to allow all individuals residing in rural America, including Native Americans, to enjoy the benefits of access to basic and advanced telecommunications services.

Background

Western Wireless has built a successful business providing wireless telecommunications services in rural America. The company holds cellular licenses to provide service in 19 western states, which include more than 85 Indian reservations and Native American communities. The Company is the second largest wireless carrier in the country based upon geography served with its cellular licenses covering about 25 percent of the land in the continental U.S. With a service area that has an average population density of approximately eleven people per square mile, Western Wireless serves many areas that do not have access to basic telephone service, much less advanced telecommunications services.

Western Wireless has a long history of providing service to unserved and underserved consumers. In 1994, through a unique arrangement with the Nevada Public Utilities Commission and the incumbent local exchange carrier, Western Wireless began providing wireless local loop service to small businesses and residential consumers in a remote area of Nevada that did not have access to wireline local telephone service. In 1999, Western Wireless began offering wireless local loop service in Senator Dorgan's hometown of Regent, a community of less than 300 people, which represented one of the first competitive local telephone service offerings in rural America and made available new and innovative services to consumers. More recently, Western Wireless has introduced competitive universal service offerings in more than 140 rural communities in Minnesota, Nevada, Kansas, Texas, and the Pine Ridge Reservation in South Dakota.

Indian Initiatives: The Success

Recognizing that many American Indian people living on federal trust land (reservations) and in tribal communities lack access to basic telecommunications services, Western Wireless has undertaken several initiatives to bridge the telecommunications divide and "make available . . . to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" as required by the Communications Act of 1934, as amended. Specifically, in August 2001, Western Wireless entered into a historic agreement called *Tate*

Woglaka (Talking Wind) with the Oglala Sioux Tribe on the Pine Ridge reservation. The purpose of Tate Woglaka agreement was to build a state-of-the-art telecommunication infrastructure necessary for economic and social development.

Western Wireless is very proud of our efforts to provide telecommunications service on tribal lands, and, most particularly, on Pine Ridge. As Senator Johnson knows so well, this is a very rural, economically depressed area lacking many of the basic necessities of life, including affordable telecommunications services. In fact, the Census Bureau identifies Shannon County consistently as the one of the poorest counties in America.

Our success on Pine Ridge can be attributed, in part, to the relationship developed between Western Wireless and the Oglala Sioux Tribe. In 1999, we responded to a devastating tornado that hit the town of Oglala on the reservation by providing emergency cellular service to emergency workers and tribal officials. When it became apparent that there was a need for basic telephone service on the reservations, we negotiated the Tate Woglaka service agreement. The agreement was signed in late 2000, and the Indian Affairs Committee was so gracious to host the ceremonial signing of that document in December 2000.

The highlights of the agreement include:

- A sharing of rights and obligations related to operations, sales, and maintenance;
- Cooperation between the tribe and Western Wireless on customer service offerings;
- \$1 monthly rate plan for *Lifeline* eligible residents;
- An expanded local calling area that eliminates all toll charges previously associated with making certain calls on the reservation and to Rapid City;
- Access to a local Emergency Service Provider on the Reservation;
- Long distance service, prepaid services, and enhanced services;
- Access to advanced telecommunications services capabilities; and
- 24-hour customer service.

Earlier this year, Western Wireless completed the expansion of the telecommunications network on the Oglala Sioux reservation, providing tribal members with access to wireless telephone service for the first time.

Our Oglala Sioux Pine Ridge offering speaks louder than words:

- There are approximately 4,000 total tribal households with a total tribal population of around 40,000;
- To date, Western Wireless has more than 3,500 customers on Pine Ridge, representing a significant market penetration in the short time our network has been operational on the reservation; and
- Of the 3,500 customers that we serve, approximately 75 percent did not have landline telephone service prior to signing up for service from Western Wireless.

Western Wireless is also working with numerous other tribes on replicating its successful service offering on the Pine Ridge reservation, but faces certain challenges that must be overcome before other tribes can enjoy the benefits of access to a competitive choice for the telecommunications needs.

Indian Initiatives: The Challenges

As difficult as it is to resolve the business issues related to providing service on reservations, the biggest challenges to bridging the telephone and digital divide on reservations are the regulatory issues, both in terms of market entry and a level playing field.

Market Entry. Section 214(e)(2) of the Communications Act provides that state commissions shall review applications by common carriers for designation as an Eligible Telecommunications Carrier (“ETC”) for purposes of universal service support, and Section 214(e)(6) of the Act provides that the FCC shall review applications by common carriers not subject to the jurisdiction of a state commission for designation as an ETC for purposes of universal service support. For our Pine Ridge offering, Western Wireless filed an ETC application with the FCC under Section 214(e)(6) based upon the tribe’s view that our service offering on the reservation is not subject to state commission jurisdiction and that Western Wireless’ designated service area would be primarily limited to the reservation (as opposed to the entire study area of the incumbent local exchange carrier). The Oglala Sioux Tribal Council formally supported our application. The South Dakota state commission and Incumbent Local

Exchange Carriers (ILECs) opposed the application on jurisdictional grounds. The state commission and the ILECs argued that the state, not the FCC, had the authority to consider Western Wireless's application under Section 214(e)(2). At the same time, the state commission was defending in the courts and at the FCC its decision to deny our state ETC application for non-tribal lands (the state Supreme Court and the FCC ultimately reversed the state commission's denial of ETC status to Western Wireless).

The FCC ultimately assumed jurisdiction over our Pine Ridge application and granted ETC status to Western Wireless for the reservation. Our application, however, reveals a problem that needs to be resolved: jurisdictional uncertainty, procedural wrangling, and legal maneuvering hamper the ETC application process that effectively denies service to rural consumers.

Although the FCC ultimately resolved the issues and granted ETC to Western Wireless, the tortuous application process has no doubt "chilled" competitive carriers' interest in serving reservations.

The Goshute reservation in Nevada and Utah, and the Winnebago reservation in Nebraska, highlights some of the problems with state action on ETC applications aimed at serving Indian reservations.

The Goshute reservation is located in both Nevada and Utah.

- Early last year, the Goshute tribe declared a telecommunications emergency due to the lack of access to basic telephone service, including emergency 911 service.
- Western Wireless applied for ETC status in rural areas of Utah and Nevada, including reservations, with the state commissions under Section 214(e)(2)—Nevada granted Western Wireless' request and Utah denied Western Wireless' request, resulting in the Company being an ETC in the Nevada portion of the Goshute reservation but not the Utah portion of the reservation.
- Western Wireless could have filed for ETC status under Section 214(e)(6) with the FCC, but the process would be lengthy, costly, and quite possibly litigious because of the uncertainty of whether the FCC has jurisdiction and the strong opposition from many states and ILECs.

In Nebraska, the situation is different, but the result is the same.

- The Winnebago tribe has been "held hostage" to the delays by the Nebraska Commission in approving Western Wireless' ETC application for rural areas of the state.

The application has been pending since August 1998.

- After 3 years, the Commission granted Western Wireless ETC status, but has held up approval of what should be pro forma approval of an Advertising Plan.

To create a process that simply recognizes tribal sovereignty and allows the tribes to benefit from telecommunication service offerings that meet their needs, the following steps need to be considered by Congress:

- Establish Section 214(e)(6) as the clear vehicle for common carriers to file applications at the FCC for ETC status on reservations;
- Impose a 6 month deadline for action on ETC applications; and
- Eliminate the public interest determination if the tribal government supports the grant of ETC status.

Level Playing Field. It has been a national policy since 1934 to make available to all Americans, regardless of the location of their residence, affordable telecommunications services. In too many cases, rural areas have been effectively excluded from the benefits of a competitive telecommunications market because incumbent local telephone companies have historically monopolized access to universal service support necessary to provide affordable telecommunications services in these rural, high-cost areas. For example, the cost of providing telephone service in many rural areas exceeds \$100.00 per line per month, and yet consumers pay as little as \$10.00 or less per month, with universal service funding making up the difference. Clearly, a competitive carrier that does not have access to universal service funds would not choose to enter the local market and compete with incumbent carriers who do have access.

The FCC's pro-competitive universal service policies, adopted pursuant to the Telecommunications Act of 1996 ("1996 Act"), are beginning to have a significant impact in enabling consumers in rural and high-cost areas to realize the benefits of local competition. These benefits include more competitive pricing structures for

telecommunications services, more responsive service providers spurred by competition, and more rapid deployment of new technologies and service packages. Aided by federal universal service policies that are consistent with competitive entry into local telephone markets, competitive carriers are developing new ways of providing basic telephone service, and are making progress in serving historically underserved and hard-to-reach markets.

Four years ago, Western Wireless embarked upon an effort to bring the benefits of competition to the local telephone market in rural and tribal America. The centerpiece of this effort has been the Company's petitions, pursuant to Section 214(e), for designation as an ETC for purposes of universal service support, which is necessary to provide affordable telecommunications services in many rural, high-cost areas. To date, Western Wireless has been designated as an ETC in 14 states and on the Pine Ridge Reservation and is working with the FCC and state commissions on furthering the goals of universal service.

These inroads have not come without a high cost, however. While the ILECs were summarily designated ETCs for participation in federal universal service programs, new entrants seeking to serve high-cost and rural areas often face costly, extensive, and protracted proceedings for ETC status. In addition, in states with their own universal service support programs, it is often difficult, and sometime impossible, to gain access to funds set aside for incumbent local exchange carriers.

The 1996 Act mandates the elimination of the historical barriers to local competition in rural areas by requiring the FCC and state commissions to open the universal service market to competitive entry. It has been six years since Congress passed the Act, and many tribal and rural consumers still await the promised benefits. Simply put, many state commissions have not followed the FCC's lead in changing to a competitive universal service system, which I believe is critical to closing of the "digital divide" in tribal and rural America.

What steps can Congress take to create a level playing field for all service providers in the universal service market?

First, Congress should impose a 180-day deadline for state commission action on ETC applications. Congress has imposed a similar deadline for state commission action in interconnection arbitration proceedings. The FCC has sought comment on whether to impose a 180-day deadline for state commission action on ETC applications, but is facing strong opposition from state commissions and is unlikely to take action on this proposal. Expedient action on ETC designations will facilitate new service offerings on reservations, and will also have the salutary benefit of qualifying the tribal customers for the two components of the FCC's Low-Income program: *Lifeline and LinkUp*. Although Lifeline and LinkUp are available to all qualifying low-income consumers, the FCC's enhanced Lifeline and LinkUp programs provide special additional discounts to qualifying subscribers living on tribal lands. The enhanced Lifeline program for qualified subscribers on Native American Indian and Alaska Native tribal communities gives federal discounts of up to \$30.25 off monthly telephone bills. Additional discounts are sometimes available under state Lifeline programs. As a result, depending on current rates, many eligible subscribers on tribal lands are eligible to receive basic local phone service for \$1 per month. All of Western Wireless' Pine Ridge Lifeline customers receive service at \$1 per month, which, together with an attractive service offering, has greatly increased telephone penetration rates on the reservation. The enhanced LinkUp program for qualified subscribers on Native American Indian and Alaska Native tribal communities also offsets up to \$100 for installation costs.

Second, Congress should encourage and enable the FCC to ensure that (i) states establish competitively and technologically neutral rules and procedures for designating common carriers as ETC for purposes of state and federal universal service support, (ii) states establish explicit, portable, and competitively-neutral universal service funding mechanisms free of implicit subsidies that have the effect of entrenching the incumbent carriers in the universal service market, and (iii) funds are available to cost-effectively provide service in high-cost areas. The Tenth Circuit Court of Appeal's remand, in *Qwest Corp. v. FCC*, of the *Federal-State Joint Board on Universal Service, Ninth Report and Order*, presents an ideal opportunity for the FCC to re-examine universal service reform to identify "uneconomical attributes of the current system that dampen competitive opportunity," with an eye toward remedying "shortcomings in the current system that "undermine economic competition and new entry." Among the most vital steps in this process will be, at long last, creating "inducements" for state commissions to adopt rules and policies that work in conjunction with federal efforts to preserve and advance universal service in a competitive environment, consistent with the 1996 Act and the Tenth Circuit remand decision. The adoption of explicit rules is critical, in that new entrants should not have to

resort (as has been the case to date) to piecemeal FCC oversight of individual state ETC designations and universal service programs. Such FCC proceedings are themselves costly and time-consuming, and new entrants must bear the burden of demonstrating the need to preempt state action pursuant to Section 253 of the Act.

Spectrum Management: The Key to Unlocking New Services

It should not be overlooked that as the new Internet economy moves from wired to wireless, the need for the development of a long-term spectrum allocation plan is vital if your constituents and our customers are to see the benefits of this new economy. The Congress, the FCC, the Administration, and industry must continue to work together to develop a roadmap for a comprehensive spectrum allocation policy that (1) is market driven, (2) is open to the greatest number of participants, (3) considers industry's additional spectrum requirements to provide innovative advanced services to consumers at home and abroad, and (4) encourages continued competition in the wireless industry and equal footing in international markets. In the long run, this market-based approach will be better for the U.S. economy, better for consumers, and better for American taxpayers. The wireless industry is working with congressional and Administration leaders to promote economic growth in the short-term by providing a pathway to spectrum for a high-tech growth industry that enables it to compete in the global marketplace—recognizing at the same time that national security interests benefit from a comprehensive, spectrum management plan.

Conclusion

Competition holds the key to the deployment of high quality telecommunications services—regardless of where it is offered. Government should ensure a level playing field through the establishment of a competitive universal service system, a comprehensive spectrum allocation policy, a fair and responsive competitive bidding process, reasonable tower siting policies, reasonable incentives and funding to provide advanced services in rural America, and strong enforcement action against anti-competitive behavior by incumbent carriers. In so doing, the goals of the Telecommunications Act of 1996 will be fulfilled and the “digital divide” will be eliminated.

The Western Wireless Story

Western Wireless' entry into the local telecommunications market reflects a building block approach to the provisioning of advanced telecommunications services in rural America. Today, Western Wireless provides service (*d.b.a. Cellular One*) throughout the more than 140 rural service areas and small metro areas licensed to the Company covering approximately 25 percent of the geography of continental United States. The Company has expanded its service offerings to include residential phone service (RPS) in rural areas by using its existing cellular network infrastructure, including switching, high-bandwidth network facilities, cell sites, and wireless local loops (WLL), to provide new and innovative local telephone services, including universal telephone service, to consumers. The expansion of its service offerings in rural areas to provide WLL and universal service enables Western Wireless to offer consumers advanced telecommunications services, including high-speed data services, using 3rd generation cellular technology.

Wireless (Cellular) Telephony Service Provider

- Rural service provider in 19 western states (AK, AZ, CA, CO, ID, IA, KS, MN, MO, MT, NE, NV, NM, ND, OK, SD, TX, UT, WY) (<http://www.wireless.com>).
- State-of-the-art telecommunications infrastructure in rural areas.
- Planned deployment of 2.5 generation and 3rd generation technology capable of delivering advanced telecommunications services, including high-speed data services.

Universal Service & Wireless Local Loop Provider

- ETC status granted in 14 states (CA, CO, IA, KS, MN, NE, NM, NV, ND, OK, SD, TX, UT, WY) and one Indian Reservation (Pine Ridge in South Dakota).
- Serving over 140 markets in 5 states (KS, MN, NV, TX, Pine Ridge), with thousands of universal service customers.
- Industry leader in the deployment of wireless local loop service in rural America.

- Sole provider of local telephone service to the residents of many rural areas.

Senator CAMPBELL. Mr. Day.

STATEMENT OF WILLIAM DAY, CHAIRMAN, CULTURE AND HERITAGE COMMITTEE, UNITED SOUTH AND EASTERN TRIBES

Mr. DAY. Thank you, sir. Mr. Chairman, I am very encouraged to hear all of this very positive effort to bring many of our people into this century. However, sir, I have to digress from all of this good talk that has occurred, and talk about something that is occurring that I think will probably shock some people in this room.

I first got to know you and Senator Dale Bumpers and of course I already knew Bennett Johnson and Lowell Weicker back in 1991, 1992, when the amendments to the National Historic Preservation Act were being passed at your hand.

Unfortunately, your work has been thwarted, grossly thwarted by the Federal Communications Commission and its allies. We have been taken advantage of, not with Government to Government relationship from the FCC, or recognition of the trust responsibility that exists with the FCC, or the issue of sovereignty, which I have heard you, Senator, speak on many times at conferences, and the importance of that very word, and its 500-year history in this country.

The FCC has taken it upon themselves to tell individual private companies, commercial enterprises, that they have been delegated the authority to consult with Tribes. There is absolutely nothing whatsoever in Federal law that permits that. There is nothing in the advisory council regulations on section 106 that permits that. As a matter of fact, in the preamble it expressly prohibits that, but that is what has happened. There are 800—that is just this year's—demands by these private companies that we provide them at our cost, and the usurpation of our staff and our finances, to accommodate what they need to satisfy section 106 without any compensation or even thank you to the Tribes.

I represent here at this meeting the United South and Eastern Tribes, 24 Tribes from Maine to Texas. Specifically I represent the Poarch Creek in Alabama. This is Poarch Creek letters, 688 of these demands on their time and staff from these private enterprises, authorized by the FCC to do this and impose upon us a burden, both financial and personnel-wise, that if it were property would amount to a constitutional question of a taking. Now, it is an unfunded mandate, and they have no right whatsoever to do that.

There is also no reason whatsoever on earth that I would share with this company that I have no idea who these people are, what they want here, our religious sites, our sacred sites. They want to know that. We cannot do that. We can do it with a Federal agency, where the law will apply, but the Federal law does not apply to them, and the exemptions that exist under the Freedom of Information Act that we can rely on with an agency does not exist here. These are people with a commercial bent, whatsoever, and I guarantee you I congratulate these people who want to serve the rural communities, and do not forget, we have got an awful lot of woods

in Maine as well, so you know, there are some people up there that do not have telephones.

But one of the earliest, one of the very earliest reactions to this is from your neighbor that spoke, who are saying, how do you, the FCC, come off doing this to us? There is nothing in the law that says this, that you can permit these people to impose themselves on our time and our finances to serve their gain. This is what is going on, Senator, and what is going on is that no one, to our knowledge, is following up on whether these people have actually abided by section 106 of the National Historic Preservation Act. We cannot determine that, and as a result, what is happening when these people tell us that if we do not answer them within 30 days, they will proceed. There are even letters in here saying if I do not answer them in 10 days they will proceed, at my expense, of course.

Now, I cannot possibly research something like this, with 1,000 of these. How many people do I need on my staff? How many do you have on your staff that are going to read all of these? Because I certainly do wish to make these part of the record, for your own delight, of course.

You know, it takes a while just to read one of these things, but I am not required by any law that I know of, moral, ethical, or legal, to even open these people's letters. They have no call on the sovereignty of a federally recognized Indian Tribe, but yet this agency would allow them with their leave to cross our borders, so to speak, and impose themselves upon us, and this is going on every day. It goes on in every State of this Union, and it certainly is true here in the South and the East.

Every Tribe of the USET Tribes have received thousands of these demands from these outside people that we know nothing about. They are even in here, sir, a photograph of the base and the anchors put in the ground by a phone company and then saying, we are going to go do a survey. Well, I mean, it is a little late on that, you know. We have got another one over here that says, we are not archaeologists, but we walked over the ground and did not see anything, so therefore there is nothing there. This is what is happening to the National Historic Preservation Act, and to the cultural and historic heritage of everyone in this country.

And what are they doing about it? We have met with them—there is one of their lawyers sitting right back there that was with us here in February at our conference, and we asked, “do you understand what we are saying?” There were six of them sitting there. “Do you understand what we are trying to do, do you understand what we are saying?” “Uh-huh.” But apparently not.

We also, Senator, spent 8 months of our time—I made six trips to Washington, D.C. to meet with representatives of PCIA, the public—one of their cell phone company associations, to work out a programmatic agreement of protocol, how we could handle this thing equitably and timely to everyone. We were taken advantage of. We met in good faith, an attorney back here, Bennett Johnson associate, Gregg Smith and others, sat down with these people and wrote and wrote and wrote, and back and forth, an agreement, and then when it was finally sent to them for their signature, they said well, we are not really interested anymore. But in the meantime

they went about building their towers while we held back trying to attempt to work with these people.

Now, we have come forward, we have said, we cannot justify in any manner whatsoever the expenditure of tribal funds and the expenditure of tribal personnel to answer these people's problems, and we also would like to know how it is that they come off saying that the FCC has given them, has delegated to them the ability to conduct Government to Government consultation with a federally recognized Tribe. You have no such authority whatsoever, none.

It does say that it can to a THPO, but let me define Tribal historic preservation officer. I happen to be the first one recognized in this country under section 101(d)(2). That exists, according to the advisory council's own definition of Indian land, within the exterior boundaries of a reservation and no place else, and so when they say we are giving it to the THPOs, they have assumed that Tribal historic preservation officer is something that exists outside the boundaries. It does not. You are then dealing with the Tribe again, and again you cannot delegate that, and so these are totally illegal. If you have licensed these, then you have done so not in recognition of the law and your responsibility, and we ask relief from it, sir. We ask relief just from somebody having to spend half a day opening these pieces of mail.

And we have offered, we have gone the full measure to try and work agreements with these people that we would be adequately compensated for using our resources to answer their questions. We have not attempted to bleed them dry, so to speak. We felt that a reasonable fee, we used the fee of \$300, to research what they needed, to take the time, put somebody on this to answer these questions, was not unreasonable, particularly in light of the fact that last year I saw an ad in the New York Times, a full page ad. It was nothing but a cell phone tower. In big, 52-point type outside on the side of it said, "This is not a tower. This is a money tree." And that being the case, we would like a leaf or two off of it for our trouble. We do not think that is too much to ask, and we also ask please, that somebody in the Federal Communications Commission give more than lip service to the concept of Government to Government relationship, and sovereignty, and your responsibility of trust.

Thank you, sir.

[The prepared statement of Mr. Day follows:]

PREPARED STATEMENT OF WILLIAM DAY, CHAIRMAN, CULTURE AND HERITAGE
COMMITTEE, UNITED SOUTH AND EASTERN TRIBES

I. Introduction

Thank you, Mr. Chairman and Members of the Senate Committee on Indian Affairs and the Communications Subcommittee of the Senate Committee on Commerce, Science and Transportation for this opportunity to testify regarding telecom carriers, tribal governments and the siting of communication towers. My name is William Day. I am Chairman of the Culture and Heritage Committee of the United South and Eastern Tribes, Inc., an inter-tribal organization consisting of 24 tribes from Maine to Texas. I am also the Tribal Historic Preservation Officer for the Poarch Creek Indians and the Jena Choctaw, as well as the Native American Affairs coordinator for the Louisiana, Mississippi and Oklahoma National Guard. I was deeply involved in the development of the current regulations for the National Historic Preservation Act, as well as the Army Alternative Procedures for Section 106, the tribal consultation process.

I would like to address my comments specifically to the failure of the FCC to comply with Federal law when it comes to consulting with tribal governments before cell towers are constructed, the questionable legality of the FCC's purported delegation of its tribal governmental consultation obligations to private entities (the cell tower companies), and the appropriateness of tribe's charging fees of cell tower companies when those companies seek unique tribal expertise in evaluating tower sites in order to comply with a host of laws including the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

This has been an area of great frustration for Indian tribes and for tribal historic preservation officers. Despite federally mandated consultation requirements, literally tens of thousands of cell towers have been constructed across the United States with virtually no effort by the FCC to consult with tribes. A number of these towers have had an adverse impact on sites of religious and cultural importance to Tribes. In a belated attempt to make up for past errors, the FCC has stated that it has delegated its consultation obligations to the cell tower companies, who are now sending letters to tribes demanding information, some of it very sensitive in nature, and asserting that if the information is not provided within a certain timeframe, usually 10 to 30 days, as one typical letter to the Chitimacha Tribe of Louisiana put it, "[w]e will presume that a lack of response from the Chitimacha Tribe of Louisiana to this letter will indicate that the Chitimacha Tribe of Louisiana has concluded that the particular project is not likely to affect sacred tribal resources." In the last year, many tribes have received hundreds, and even thousands of these letters. To add insult to injury, the letters frequently refer to the tribes as "organizations" or "groups" demonstrating disrespect for tribal sovereignty, ignorance of the status of tribes and their unique legal rights, and generally conveying an impression that these companies do not care about tribal views.

Despite the onerous workload involved in responding to these letters, the cell tower companies, which stand to make great profits from these towers, have with few exceptions, been unwilling to pay fees to cover tribal costs. These exceptions are worth noting, as they demonstrate that it is both possible and practical to establish a process involving tribes and cell tower companies which addresses tribal concerns, meets the economic needs of the cell tower companies, and preserve the consultation obligation of the FCC. For example, the Seminole Tribe of Florida has developed a professional relationship with a number of cell tower companies whereby for appropriate fees, the Seminole Tribe is able to respond in a timely manner to the requests of those companies. The process works smoothly in great part because the companies know, in advance, exactly what kind of information the Tribe needs to be able to respond. Similarly, the Narragansett Tribe has worked out an effective process with cell tower companies in Rhode Island, but has met with opposition from cell tower companies in Massachusetts and Connecticut. The success stories are the exception. By and large, cell tower companies need tribal expertise to properly evaluate commercial cell tower sites, but have refused to pay for that expertise. The FCC has an independent obligation to consult with tribes, but has refused to enter into consultation, pawning off that responsibility to the cell tower companies. Meanwhile the tribes, who are generally financially strapped, fear the continuing loss, damage or destruction of tribal cultural properties as communications towers proliferate.¹

In an effort to work with the communications industry, the United South and Eastern Tribes reached out last year to industry trade organizations. With one exception, the Personal Communications Industry Association (PCIA), USET was rebuffed. At considerable expense, USET entered into detailed negotiations with PCIA over establishing a process for handling this issue. From the tribal perspective, we worked hard to find pragmatic solutions, while still assuring respect for tribal sovereignty and maintaining the FCC's ultimate consultation responsibility. Based on the negotiations, USET developed and sent to PCIA a detailed proposal for establishing a set of protocols, which I have attached.² We waited many months for a response, and then were told that PCIA had no further interest in these negotiations.³

The letter and spirit of such laws as the National Historic Preservation Act have been ignored, and continue to be ignored. The agency principally responsible for this state of affairs is the Federal Communications Commission. Although the FCC has made a few timid efforts in the last year to address these issues I, for one, see little actual progress. As an example, I have attached to my testimony an email I received from the Tribal Historic Preservation Officer for the Mississippi Band of Choctaw Indians, Ken Carleton. In his email he noted that the Mississippi Band had received "a minimum of about 400-500 requests" from cell tower companies, many providing virtually no information on the location of the sites or maps, but all with at least a check off saying that there are no sites of religious or cultural importance to the tribe to make it easy to "rubber stamp their requests!" See Attachment C. Mr.

Carleton's email goes on to describe in some detail his experience with an FCC-sponsored Telecommunications Working Group in which he responded to a Public Notice issued by the FCC for tribal input, a notice which was never sent to the tribes to the best of my knowledge despite the fact that we have complained repeatedly to the FCC in the last year about its lack of contact and consultation with tribes. Mr. Carleton describes the lack of regard for his views on the Programmatic Agreement that was under discussion (by the time he received a draft copy it was already draft number 9 or 10). He has since learned that the draft agreement will likely be submitted to the Advisory Council for Historic Preservation for approval at its June 2002 Meeting, despite the fact that there has been virtually no tribal input. This level of disregard for tribal views is, unfortunately, all too common.⁴ It is also a violation of federal law, the trust responsibility, and the government-to-government relationship between the United States and Indian tribes.

The FCC has consistently disregarded and denigrated Tribal views. Last year, the FCC advocated, and the Advisory Council on Historic Preservation adopted an antenna co-location agreement for existing cell towers with little regard for tribal views. Notably, former FCC Commissioner Tristani was quoted in the March 19, 2001 issue of *Communications Daily* as expressing concern that the agreement fell short of the FCC's obligation to facilitate tribal consultation. She stated that "[t]he overwhelming majority [of tribal comments] told us our approach is not working. This response is prima facie evidence that our understanding of tribal consultation is misguided." The Tribes could not have said it better themselves.

As sovereign nations, Tribes have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their cultural and religious properties and the right to be treated with respect by Federal agencies. Federal law acknowledges these rights, but Federal agencies have been reluctant to comply.

II. Principal Issues of Concern

A. The Federal Communications Commission (FCC) has violated the tribal consultation requirements of the National Historic Preservation Act, particularly when it comes to the licensing and siting of communications towers.

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. Section 440(f). The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included," or "eligible for inclusion" in the National Register of Historic Places. *Id.* The NHPA is implemented through a complex regulatory scheme (the Section 106 process), a consultation process through which federal agencies collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See* 34 C.F.R. Part 800.

The NHPA has always required consultation with Tribes, but in 1992 it was specifically amended to clarify and mandate such consultation. The 1992 amendments state that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 16 U.S.C. Section 470a(d)(6)(B) (emphasis added). The FCC licensing process for cell tower antenna arrays is a federal undertaking, but the FCC has consistently failed to consult with Tribes in this process.

The NHPA tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to tribal religious or cultural properties located on or off tribal lands. The law does not provide for delegation of this responsibility to private entities, such as cell tower companies.

B. The FCC is also in violation of general principles of Federal Indian law which recognize tribal sovereignty, place tribal-U.S. relations in a government-to-government framework, and set forth a Federal trust responsibility to American Indian tribes that applies to all Federal departments and agencies.

These general principles are rooted in the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act), Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regula-

tions, and case law, as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*.

(1) Federal Statutory Consultation Obligations with Indian Tribes on Religious Matters. Congressional Indian policy with respect to Indian religious matters is set forth in the American Indian Religious Freedom Act (AIRFA):⁵

“Protection and preservation of traditional religions of Native Americans Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

42 U.S.C. Section 1996. AIRFA also requires federal agencies to consult with Native American traditional religious leaders in order to evaluate existing policies and procedures and make changes necessary to preserve Native American cultural practices. Act of Aug. 11, 1978, P.L. 95-341, Section 2. 92 Stat. 470.

There are several other statutes where Congress has set forth a policy of protecting traditional Indian religion, such as the Native American Graves Protection and Repatriation Act (NAGPRA),⁶ the Archaeological Resources Protection Act (ARPA),⁷ and the National Museum of the American Indian Act (20 U.S.C. Sections 80q to 80q-15). The consultation requirements of, and legal rights established by, these statutes are not geographically confined to situations where cultural or religious objects are found (or activities occur) solely on tribal lands.

(2) Executive Action. There are also several presidential orders which mandate Federal consultation with Indian tribes. Executive Order 13007 (May, 24 1996) (hereafter “Executive Order on Sacred Sites”) directs federal agencies to provide access to American Indian sacred sites, to protect the physical integrity of such sites and, where appropriate, to maintain the confidentiality of these sites. This Executive Order on Sacred Sites also incorporates a prior Executive Memorandum issued on April 29, 1994, which directed federal agencies to establish policies and procedures for dealing with Native American Tribal Governments on a “government-to-government basis.”

Executive Order 13175 (Consultation and Coordination with Indian Tribes, November 6, 2000) directs Federal officials to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

(3) Federal Court Interpretation of Indian-Related Statutes. The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) (“the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians”); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973). In this context, the National Historic Preservation Act should be read broadly to support and protect tribal interests.

There has been an effort from some quarters to cloud the consultation right by asserting that the tribal right to consultation is not as strong off tribal lands as on tribal lands. This argument ignores the fact that Congress, in providing in the National Historic Preservation Act that federal agencies “shall consult” with Indian tribes regarding their properties of cultural and historic importance, created no distinction between off and on-reservation sites. It also ignores the numerous instances where Congress has acted to provide tribes with jurisdictional and other rights off tribal lands in conformity with the “overriding duty of [the] Federal government to deal fairly with Indians wherever located. . . .” *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). One quirk in this legal framework is that the authority of the Tribal Historic Preservation Officer is a creature of federal statute (101(d)(2)(3)). The federally created Tribal Historic Preservation Officer arguably only has jurisdiction over tribal lands. Nonetheless, this limitation does not affect the Tribes’ right to be consulted with regard to tribal cultural and religious properties located off of tribal lands. A tribe may designate the federally created Tribal Historic Preservation Officer as the Tribe’s representative for the off-reservation sites.

C. The FCC has unlawfully attempted to delegate its consultation obligations to the cell tower industry.

The FCC's consultation obligation is an "inherent Federal" or "inherently Governmental" function that is non-delegable. FCC efforts to delegate this function to the cell tower companies violate the principle of separation of powers founded in the Constitution. The U.S. Constitution provides that "[t]he executive power shall be vested in a President of the United States of America," and gives the President the responsibility to "take care that the Laws be faithfully executed." U.S. Const., art. II, sec. 1, cl. 1; art. II, sec. 3. The President delegates this power to Federal officers ("Officers of the United States") pursuant to the Appointments Clause. U.S. Const., art. II, sec. 2, cl. 2.

The Federal courts have identified a "horizontal" component of the Appointments Clause that assures that executive power is not exercised by individuals appointed by, or subservient to, another branch of government. See *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Bowsher v. Synar*, 478 U.S. 714. The Courts have also identified a "vertical" component of the Appointments Clause that protects against the delegation of Federal authority to private entities outside the constitutional framework. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

The Executive Branch has further interpreted the "Vertical" component of the Appointments Clause in OMB Circular A-76 which states that certain functions are "inherently Governmental in nature" and therefore can only be performed by Federal employees.⁸ The circular goes on to specifically identify as governmental functions "activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." The circular describes specific examples of the "act of governing," including "management of Government programs requiring value judgments", the "regulation of the use of space, oceans, navigable rivers and other natural resources," and the "conduct of foreign relations." Under each of these bases, as well as the unique Federal trust responsibility to Indian tribes, the FCC's obligation to consult with federally recognized sovereign Indian tribes with regard to federal undertakings that could affect tribal cultural and religious properties is a non-delegable "inherent Governmental" function.

Although the Advisory Council on Historic Preservation has promulgated regulations that purport to allow limited delegation by an agency to private entities "to initiate consultation" with tribes, such delegation, on its face, violates the "vertical" component of the separation of powers doctrine. Moreover, even these regulations require notification to Tribal Historic Preservation Officers of such a delegation, which the FCC has not done. Contradictorily, and in an attempt to have their cake and eat it too, the ACHP regulatory process also provides that agencies that do delegate the initiation of consultation "remain responsible for their government-to-government relationship with Indian tribes." It is not possible to delegate this consultation obligation to private companies and maintain the government-to-government relationship with a tribe at the same time.

D. The cell tower companies seek information from tribes necessary to carryout National Historic Preservation Act, NEPA and other requirements, but have generally been unwilling to pay for that expertise.

Tribes have a consultation right, but lack the resources to exercise it. The Federal government has an obligation to protect this right, but has failed to do so. The cell tower companies, in order to complete their evaluation of potential cell tower sites, often need the unique expertise of tribal experts to evaluate the sites but are generally reluctant to provide compensation which would be standard for other professionals. In the last year, tribes have been buried in hundreds and even thousands of letters from cell tower companies demanding a response, usually within 10 to 30 days. Few, if any tribes, can afford to put thousands of staff hours into responding to these letters which only benefit the cell tower companies' commercial interests. If a tribe does not respond, or seeks compensation for services rendered to help the cell tower companies, the cell tower companies move ahead without any regard to tribal interests or rights.

III. Court Decisions under the National Historic Preservation Act.

A review of federal court decisions brought by tribes under Section 106 of the NHPA demonstrates a pattern of non-compliance and an unwillingness to truly seek tribal input by federal agencies. See *e.g.*, *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990); *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). These same cases also demonstrate how important the NHPA is to tribes to provide some mod-

icum of protection to their sacred and cultural properties, particularly those properties located off tribal lands.

In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995),⁹ the United States Court of Appeals for the Tenth Circuit held that the U.S. Forest Service violated section 106 of NHPA by failing to properly evaluate or reasonably pursue information provided by various Pueblos regarding the Las Huertas Canyon as a traditional cultural property eligible for listing in the National Register. The Forest Service had sent letters to various local Pueblos requesting information regarding the existence and location of traditional cultural properties in the Las Huertas Canyon, and had attended various tribal council meetings to request the same information. General information was made available to the Forest Service indicating the existence of sacred ceremonial sites, but specific information was not provided largely because secrecy is often a vital aspect of these ceremonies.

The Forest Service took the position that it had made the efforts required by the regulations to identify historic properties in the canyon and that none existed. The SHPO concurred in this determination and a final agency decision was rendered.¹⁰ The Pueblo of Sandia brought suit in federal district court, alleging, among other things, that the Forest Service failed to comply with section 106 of NHPA by failing to properly evaluate the canyon as a “traditional cultural property” eligible for listing on the National Register. The district court noted that the Forest Service “does not appear to have taken the requirements of [the NHPA] very seriously.” 50 F. 3d at 858, quoting *Memorandum Opinion and Order* (April 30, 1993) at 12. Nevertheless the district court ruled in favor of the Forest Service, finding that it had made the required “good faith effort” to identify historic properties in the canyon.

The United States Court of Appeals for the Tenth Circuit reversed the district court, finding that the Forest Service violated its obligation under Section 106 by failing to adequately pursue information it had in its possession that the canyon was used by the Pueblos for religious and ceremonial purposes and contained sacred sites: “[W]e hold that the agency did not reasonably pursue the information necessary to evaluate the canyon’s eligibility for inclusion in the National Register.” *Pueblo of Sandia*, 50 F.3d at 861. The Tenth Circuit also found that the Forest Service failed to act in good faith by withholding certain information, and by ignoring various of the section 106 procedural requirements (e.g., not providing documentation to the SHPO upon concluding that no historic properties existed until after litigation was filed by the Sandia Pueblo).

Similarly, in *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990), the United States District Court for the District of Arizona found that the Bureau of Indian Affairs (BIA) and the Department of Interior failed to adequately consider the effects of a federal undertaking on Navajo ceremonial sites located in areas no longer a part of the Navajo reservation. (The sites were located on what is now Hopi reservation land.) The district court issued a preliminary injunction enjoining further governmental activity as a violation of Section 106 of NHPA. The court held that the BIA violated Section 106 consultation requirements because it failed to consult with the Navajos. (The BIA had consulted with the Hopi Tribe but not the Navajos, apparently because the sites were not located on Navajo land.) The court emphasized that the Section 106 process depended upon proper consultation since the goal is to gather the necessary information to properly evaluate historic properties. Moreover, “the regulations clearly contemplate participation by Indian tribes regarding properties beyond their own reservations.”

The *Attakai* court also held that the BIA violated Section 106 by failing to consult with the Advisory Council and the SHPO during the preliminary determination as to whether historic properties existed which were eligible for protection under Section 106. The BIA had conducted its own survey to locate historic properties and a BIA archeologist had recommended certain steps intended to avoid adverse effects on the properties located. Significantly, BIA officials testified that it was standard practice for the BIA Phoenix Office to make eligibility and adverse effects determinations under Section 106 *prior to consulting* with the SHPO. The court emphasized the importance of the initial identification stage of the Section 106 process. Here, however, the BIA ignored the procedures, acting “contrary to the letter and spirit of the regulations.” 746 F. Supp. at 1408. The court concluded that the BIA “did not adequately take into account the effect of the undertakings on historic properties” in violation of the NHPA.

The Army Corps of Engineers (Corps) was found to have flouted Section 106 procedures in *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). In *Marsh*, the district court granted the plaintiff Colorado River Indian Tribes (Tribes) an injunction against the Corps’ issuance of a permit for construction along the western shore of the Colorado River in California, on land abutting property owned by the United States, administered by the Bureau of Land Management

(BLM), and located near the Colorado River Indian Reservation. The BLM managed land is an archeological district with significant cultural and archeological sites. The construction involved the placement of riprap along the riverbank to stabilize the bank and establish a boundary line for a housing development.

In conducting surveys to determine if eligible historic or cultural properties existed, the Corps relied on proposed (but not yet promulgated) regulations it had adopted but which had not been approved by the Advisory Council as counterpart regulations for Section 106. These proposed regulations imposed different responsibilities on the agency depending on whether a site was listed on the National Register and those not yet listed, but potentially eligible. By doing this, the Corps was able to conduct archeological surveys in a more limited area than the section 106 regulations require and the Corp therefore did not survey the required areas for potentially eligible historic and cultural sites. The Court emphasized that possible sites of archeological and cultural significance had subsequently been located on lands nearby the proposed development that should have been surveyed if the proper regulations had been adhered to.

In short, the court in *Marsh* concluded that the Corps “breached its responsibilities under NHPA,” and violated Section 106 by failing to properly evaluate ceremonial sites of the Colorado River Indian Tribes as eligible properties entitled to protection under Section 106. 605 F. Supp. at 1438.

All of the above cases were brought by tribes who claimed an interest in traditional cultural sites located off tribal lands. They were all brought prior to the time that Congress amended the NHPA to statutorily impose an affirmative obligation on federal agencies engaged in the Section 106 consultation process to “consult” with “any Indian tribe or Native American Organization.”

IV. Conclusion

The FCC has been unwilling to live up to its consultation obligations both under the National Historic Preservation Act and the Trust Responsibility to Tribes. Instead, it has sought to delegate those obligations to the cell tower companies, who have little understanding, and generally even less regard for, tribal sovereignty. The cell tower companies have sought the unique expertise of tribes in the evaluation of sites for commercial cell towers, but have been unwilling generally to cover the costs associated with using that expertise. The result is an untenable situation where tribal rights are trampled and tribal cultural and religious properties are endangered. I urge the Committee to examine this situation closely and ensure the protection of tribal rights and properties.

Thank you for this opportunity to testify. Your attention to this matter is very important, and greatly appreciated by the United South and Eastern Tribes.

ENDNOTES

¹One of the cruel ironies of this situation is that cell tower companies and many tribes tend to value the same place: high points in the landscape.

²Attachment A: “Protocols Governing the Relationship between Federal Recognized Indian Tribes and Wireless Communication Tower Manufacturers in the Review of Cell Tower and Tenant Array Siting,” Draft Number 4, August 9, 2001.

³In marked contrast to USET’s experience with the communications industry, I have personally been involved in a number of successful negotiations regarding consultation with tribes with the Louisiana National Guard (see Attachment B), the development of a Memorandum of Agreement between the Poarch Creek Indians and the Alabama National Resource Conservation Service (which is serving as a model for other NRCS’s), and the establishment of a Keepsake Heritage Cemetery at Camp Beauregard for internment of American Indian remains.

⁴See discussion at Section III, below.

⁵Pub. L. No. 95–341, Section 1, 92 Stat. 469 (1978)(codified at 42 U.S.C. Section 1996 (1988)).

⁶Pub. L. No. 101–601, Section 2, 104 Stat. 3048 (1990)(codified at 25 U.S.C. Sections 300–13 (Supp. III 1991)).

⁷Pub. L. No. 96–95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa–70mm (1988)).

⁸OMB Circular A–76

“5. *Policy*. It is the policy of the United States Government to:

b. *Retain Governmental Functions In-House*. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

6. *Definitions.* For purposes of this Circular:

e. An *inherently Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 and OFPP Policy Letter 92-1, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of inherently Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

(1) *The act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.”

⁹Although this case was decided by the Court of Appeals in 1995, the district court case was brought earlier, and the facts complained of occurred prior to 1992 when Congress amended the NHPA to provide tribes with consultation rights (see discussion below).

¹⁰After the Pueblo of Sandia filed suit in federal court, the SHPO withdrew its concurrence in the Forest Service’s “no adverse effects determination.” There is evidence that the Forest Service withheld certain information from the SHPO.

Attachment A

Protocols Governing the Relationship between Federally Recognized Indian Tribes and Wireless Communication Tower Manufacturers In the Review of Cell Tower and Tenant Array Siting

I. INTRODUCTION

A. Background. The Personal Communications Industry Association (hereinafter, PCIA) and the United South and Eastern Tribes (hereinafter, USET), a consortium of 24 Federally recognized Indian Tribes east of the Mississippi River (hereinafter, Tribes) have established these Protocols in order to govern the review process whereby the individual USET Tribes and the individual Cell Tower Manufacturers (hereinafter, CTM) represented by PCIA may establish and regularize working relationships, and in order to evaluate the potential impact of cell tower and tenant array—both “green fields” (new site) and co-location sitings on properties of religious and cultural significance to the Tribes.

Since 1492, Indian Tribes within what is now the United States have, as a group, lost 98 percent of their aboriginal land base. This percentage is even higher for the member Tribes of USET, whose aboriginal lands were the first to be subsumed in the process of European settlement. Today, as a result, the overwhelming majority of Tribal properties of cultural and religious significance are located off Indian Reservations and Federal trust lands.

The National Historic Preservation Act (NHPA) recognizes the validity of continuing Tribal concerns with the protection of both on- and off-Reservation properties of cultural and religious significance, and establishes extensive Federal agency Consultation requirements with Tribes when there is a “Federal Undertaking,” as defined in the National Historic Preservation Act,¹ with the potential to have any affect on such properties. In the case of wireless communication towers and tenant array sitings, that responsibility resides with the Federal Communications Commission, in its capacity as permitter of the transmission frequencies.

The CTM are engaged in the construction of a universal wireless telecommunications infrastructure network that is vital to the economic and social future of the United States. The Tribal interests at issue are also vital, both to the Tribes, and

¹“Federal Undertaking” means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and, (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.”

to the United States in terms of its historic preservation goals and its national identity as a nation of diverse and vibrant peoples and cultures.

The CTM seek to establish a process for Tribal review of tower sitings that will expedite the Federal Communications Commission's Section 106 Consultation process responsibilities under the National Historic Preservation Act. As a central part of this process, the CTM seek access to the unique expertise held by Tribes in the identification, evaluation, assessment of effects, and treatment of these sites, and understand the value of obtaining these professional services. Consequently, it is of great importance to the CTM that a cost-effective, fair, predictable, and consistent process be established for accessing Tribal expertise.

Through these Protocols, the parties seek to assure that legitimate and important Tribal interests in the preservation of properties of religious and cultural significance to the Tribes are fully recognized, while also addressing the needs of the CTM in a cost-effective and efficient manner.

B. Good Faith Efforts. The parties agree to comply with these Protocols in good faith to achieve the goals set forth herein.

C. Federal Indian Law Principles. The sovereign status of Federally recognized Tribes (those Tribes listed by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. Section 479a et seq.), arising from their inherent nationhood and existing since time immemorial, is affirmed in broad principles of Federal law that provide that the Federal government has a trust responsibility towards Tribes and that the United States relates to the Tribes within a government-to-government framework. As sovereign nations, Tribes have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their cultural and religious properties. These doctrines are rooted in the U.S. Constitution, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act), Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*.

D. Federal Consultation Obligation. In addition to the broader obligations of the Federal government described in Paragraph I.C., Federal agencies have a specific obligation under the National Historic Preservation Act (NHPA) to consult with Federally recognized Indian Tribes whenever a Federal Undertaking "has the potential to affect an historic property to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance" (16 U.S.C. Section 470a(d)(6)(B)). An historic property is any prehistoric² or historic district, site, building, structure or object included in or which may be eligible for inclusion in the National Register of Historic Places, including artifacts, records, and material remains related to such property or resource. (See 16 U.S.C. Section 470w.) FCC licensing of telecommunications frequencies, the integral element of tower siting and tenant arrays, therefore, is a "Federal Undertaking" within the meaning of the NHPA.

E. Federal Communications Commission. Under the NHPA, the FCC is responsible for consulting with Federally recognized Tribes whenever it engages in an Undertaking that affects Tribal properties eligible, or which may be eligible, for the National Register. The procedures established by these Protocols contemplate no specific role for the FCC. It is the intent of USET and of PCIA that these procedures should lead to a Tribal certification regarding the effect of a cell tower and antenna construction that can be relied upon by the FCC in meeting its Consultation requirements. By these Protocols, the Tribes have not agreed to any deferral, delegation, or diminishment of the FCC's Consultation obligations under the NHPA or under the FCC's trust obligation within the general principles of Federal Indian law. Except as specifically agreed to in writing by any individual Tribe, the Tribes do not concur in any delegation or abrogation of the FCC's responsibilities under the NHPA.

F. United South and Eastern Tribes. USET was authorized by its Board of Directors, representing its member Tribes (USET Resolution 2001:—), to engage in

²The parties to these Protocols recognize that the terms "prehistoric" and "historic," which respectively refer to history before and history after the arrival of the process of written recordskeeping, with the Europeans in the Americas, do not convey the historical perspective of Native Americans. Such terms are used here to maintain consistency and, therefore, clarity in the relationship with the language of Federal law and not to otherwise validate these Eurocentric concepts.

discussions with PCIA, with the intention of establishing Protocols regularizing CTM access to Tribal expertise, in order that the Tribes may protect sites and properties to which they attach historic and religious significance from impact during the process of cell tower and tenant array siting. USET recommends these Protocols to its member Tribes, but does not have the authority to bind any of its member Tribes to their acceptance.

In accordance with these Protocols, USET will establish a Tribal Lands Directory (TLD) that lists the USET Tribes and the states in which they have interest, as determined by each Tribe itself. The Tribes will provide the information to the TLD. USET will make this directory available to the CTM and their compliance sub-contractors and construction contractors through its website (www.usetinc.org). USET also will maintain a directory of Tribal leaders, at the same site, setting forth the name, title, and address for each USET Tribe and leader, and the Tribal official responsible for historic preservation. In addition, USET will facilitate these Protocols by providing mediators for the Mediation Team, as set forth in Section XI.

G. Personal Communications Industry Association. PCIA was authorized by its membership to engage in discussions with USET, with the intention of establishing Protocols regularizing CTM access to Tribal expertise, in order to expedite wireless communication tower and tenant array sitings, and assist the FCC in fulfilling its Federal responsibilities by seeking direct access to the unique expertise of Tribes. PCIA recommends these Protocols to its members, but does not have the authority to bind any of its members to these Protocols. PCIA will facilitate these Protocols by providing mediators for the Mediation Team, as set forth in Section XI.

H. State Historic Preservation Officer. These Protocols do not provide a role for the State Historic Preservation Officer (SHPO). Consistent with Federal law, the Tribes and the CTM recognize that the SHPOs have a role in the NHPA Consultation process off Tribal lands, and, in those cases where a Tribe does not have a Tribal Historic Preservation Officer (THPO) established pursuant to Section 101(d)(2) of the NHPA, on Tribal lands. Nevertheless, these Protocols are not a substitute for the FCC's proper Consultation with all relevant parties under that law. The Tribes and the CTM affirm and agree that a Tribe, and not the SHPO or others, is the ultimate authority in the process of identifying Tribal properties of cultural and religious significance. The parties recognize the unique expert knowledge of the Tribes. Consequently, notification to a CTM by a SHPO or others that there are no properties of religious or cultural significance to a Tribe at a given site shall not be taken to mean that no such properties exist at that site but, rather, shall be taken to mean only that no such properties are known, by the SHPO or others, to exist there. A search of Master Site File (MSF) records is not sufficient to make a determination about the properties which may exist at a site. Nor is an archaeological survey necessarily sufficient for such purposes.

II. PROTOCOLS OF REVIEW

This section provides specific guidelines for contacting a Tribe and providing the information necessary to obtain Tribal review of the proposed greenfield or co-location construction site.

A. Contact with a Tribe shall be made at the earliest planning stage but in no event later than when the CTM narrows its search ring to a specific site. Failure to contact the Tribe as early as possible will materially impede the review process. Contact may be made either by the CTM or its representative, e.g., an archaeological, compliance, or construction contractor (hereinafter, Contractor). If contact is made by a Contractor, the CTM shall supply to the Contractor a copy of these Protocols and sample documents, and shall require adherence to this process. If contact with a Tribe is made by a Contractor, the CTM, as the entity seeking Tribal expertise, shall nevertheless retain responsibility for compliance with these Protocols.

B. Contacting the Tribe. The CTM shall commence good faith, respectful, and culturally sensitive contact with the Tribe concerning a site by sending a "Request for Review" letter to the Tribal official specifically responsible for historic preservation. In many instances, such official will not be the Tribal leader, but another official designated to represent the tribe on historic preservation matters. (Please note: letters sent to the incorrect official or to any individual Tribal citizens will result in delays in processing.) The names, proper titles (which should be used in all correspondence), and addresses of the historic preservation officer or other individual charged with the responsibilities of historic preservation may be obtained directly from the Tribe or from the USET website (indicated, above). Facsimile transmissions of information to the Tribe will not be sufficient due to the degradation of detailed information that is necessary for decision-making. The Request for Re-

view letter must be sent either by USPS First Class Mail (preferably certified, return receipt requested), or by overnight courier service.

C. Request for Review Letter and Review Materials. A sample Request for Review Letter is appended to these Protocols, as Appendix A. In addition to the letter, the review materials provided to the Tribe should include the following basic information, at minimum. Review will not begin until these basic materials are received.

1. **Site Location** including latitude and longitude coordinates (for those areas where property descriptions occur only in metes and bounds), or Township, Range, and Section (TRS), where applicable, of all areas included in the review site.
2. **Map** with the review site plotted on copy or copies of USGS 7.5' Series Topographic Maps.
3. **Complete Site Survey Report.** (A Report Summary will not suffice.) The site survey shall be a Phase I archaeological survey, conducted by a Registered Professional Archaeologist who meets the Secretary of the Interior's Standards and has credentials that demonstrate regional knowledge and experience. The archaeological examination must be conducted on a five-meter or less established grid after a pedestrian reconnaissance along the transects, and shovel testing to sterile soil levels at each grid intersect across the Area of Potential Effect (APE). The APE shall be defined as including the primary site; any anchor sites (for guyed towers); any areas required for new construction of access road(s) and/or equipment pads inside or outside of the primary site and any anchor sites; and/or other areas of heavy equipment access.

The **Site Survey Report** must include:

- a site and area history, including a detailed description of the land, and indicating the degree of historical and current soil disturbance;
 - a bibliographic or narrative review of any prior archaeological surveys;
 - an evaluation of the potential for viewscape intrusion;
 - a review of any other potential environmental intrusions or impact; and
 - color images of the site in question (digital images are acceptable if they are output at [—] dpi, minimum).
4. **A detailed description and drawing of construction methodologies,** specifying all facets that will entail soil disturbance. This description is required for both greenfields and co-location sites.
 5. **A copy of the findings of the State-Wide Archaeological Inventory or Master Site File search, signed by the SHPO.** Please note that a finding of "no known sites" in the Inventory or MSF does not indicate that no sites are present. Nor does it relieve the CTM of the responsibility for conducting a Phase I archaeological survey (as above).
 6. **Not FCC Consultation.** A statement indicating that this Request for Review does not substitute for the FCC's Consultation obligation, although the Tribe's response and/or Certification and non-confidential data may be provided to the FCC. (See: sample Request for Review Letter, Appendix A.)
 7. **Contact Information.** Name, address, and telephone number of contact individual. If the Request for Review has been made by a Contractor to the CTM, then the name, address, and telephone number of the CTM official responsible for compliance with these Protocols shall be provided also.
 8. **Standard Review Fee.** A check to cover the standard review, made payable to the Tribe. (See: X, "Fees.")

D. Tribal Determinations in response to the Request for Review and Review Materials. The Tribe commits to a response, in writing, within 30 days of receipt of the Request for Review letter and complete review materials package. Tribal responses may include:

1. **Request for Additional Information.** If the review materials package originally provided by the CTM does not provide all of the required information (as established in II. C, 1-8), or is otherwise insufficient for the Tribe to make a decision regarding its interest in, and determination concerning, a site, the Tribe may request additional information. This request may take the form of a letter indicating the additional information required; an in-per-

son meeting or teleconference; or a site visit by Tribal representative(s). (See: X, "Fees.") The Tribe's 30-day deadline for responding to the CTM shall begin anew, upon receipt of an adequate response from the CTM.

2. **"No Interest" Determination.** If the Tribe determines that it has no interest in the site, it shall send the CTM a "No Interest Determination." The CTM may provide such a determination to the FCC in order to demonstrate that the Tribe has determined that it has no interest in the site.
3. **"No Current Interest."** If the Tribe determines, on the basis of the Request for Review letter and the complete Review Materials provided, that it has no current interest in the site it shall so inform the CTM. (For sample "No Current Interest" Response Letter, see Appendix B.) The CTM may provide a copy of this response to the FCC in order to demonstrate that the Tribe has reviewed the site materials and has issued its response. The finding of "No Current Interest" does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe. (See: V, "Inadvertent Finds.")
4. **"Deferral" Response.** If the Tribe determines, on the basis of the Request for Review letter and the complete Review Materials provided that, for reasons of culture and history, it wishes to defer its interest to another Tribe, it shall so inform the CTM. (For sample "Deferral" letter, see Appendix C.) The CTM may provide a copy of this response to the FCC in order to demonstrate that the Tribe has reviewed the site materials and has issued its response. One Tribe's Deferral to another does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Deferring Tribe. (See: V, "Inadvertent Finds.")
5. **Request for Additional Time.** The Tribe also may extend the deadline for responding by an additional 30 days if, in its reasonable judgment, it is unable to respond adequately during the initial period, for reasons of research requirements, staff constraints, or other extraordinary considerations. In such a situation, the Tribe shall notify the CTM or its Contractor prior to the expiration of the initial 30-day review period. In the case of a notification of deadline extension, the CTM shall not incur any additional Tribal review fee, in accordance with the fee provisions of these Protocols. (See: X, "Fees.")
6. **No Adverse Impact Determination.** A No Adverse Impact Determination means that the Tribe has identified no properties of cultural and religious significance within the APE or has otherwise determined that the greenfields or co-location construction, as described in the CTM's Review Materials, will have no adverse impact on any such properties. The CTM may provide the Tribe's "No Adverse Impact Determination" to the FCC to demonstrate that the Tribe has determined that the construction will have no adverse impact on any Tribal properties of cultural and religious significance. (For sample "No Adverse Impact Determination" response see Appendix——.) The Tribe's "No Adverse Impact Determination" does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe.
7. **Adverse Impact Determination.** An Adverse Impact Determination means that the Tribe has determined that the greenfields or co-location construction as described in the CTM's Request for Review and Review Materials will have an adverse impact on a property of cultural and religious significance to the Tribe. An Adverse Impact Determination will result in one of several possible courses of action: (1) the CTM may choose to abandon the site, in favor of an alternate site, and re-initiate review on the alternate site; (2) the Tribe may agree to construction at the site, with on-site monitoring by a qualified professional archaeologist; or (3) the CTM and the Tribe may agree on a Resolution Plan for the site in accordance with Section II.E., which will provide for the disposition of inadvertent finds and make arrangements for repatriation of any human remains following the steps provided in these Protocols. Absent Tribal consent, no construction or other development activities shall occur on a site with human remains unless there is a repatriation and reinternment plan, agreed upon with the Tribe.

E. Tribal-CTM Adverse Impact Negotiations. In the event that the CTM chooses to pursue negotiations with the Tribe concerning resolution of an Adverse Impact (pursuant to II, D, 7), such negotiations shall commence as soon as possible. It shall be the goal of the parties to reach a final plan on Adverse Impact resolution within 30 days of the commencement of negotiations. Such a deadline may be ex-

tended by the mutual consent of the parties. Such negotiations may lead to one of two results:

1. **Resolution Plan.** The Resolution Plan shall be an agreed-upon plan that satisfies the Tribe's concerns regarding protection and preservation of the historic properties at issue. The Tribal-CTM Resolution Plan will not necessarily address the concerns of the general public or those interested parties who have expressed concerns about the site. Nevertheless, the CTM may provide the Resolution Plan to the FCC in order to demonstrate that it has made a good-faith effort to seek out the wishes of the Tribe, and has reached a satisfactory arrangement concerning the resolution steps that will satisfy the Tribe's concerns regarding the site.
2. **Non-Agreement.** If the Tribe and the CTM fail to agree that resolution is necessary, or fail to agree upon a Resolution Plan, they shall, in the first instance, request that the Mediation Team seek a mediated resolution of the conflict. The Mediation Team shall have 30 days to work with the parties in order to reach an agreement. In the event that no agreement is reached, the parties may present their separate findings to the FCC, in order that the FCC may enter into Consultation directly with the Tribe concerning the Undertaking, as required by Federal law (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments). Once the FCC and the Tribe enter into Consultation, the requirements and remedies of the National Historic Preservation Act will apply.

III. RELIABILITY OF TRIBAL DETERMINATIONS

A Tribal determination, based upon a Request for Review and complete Review Materials, may be relied upon by the CTM before the FCC, unless the Tribe has subsequently rescinded such determination in writing, for good cause.

IV. TRIBAL FAILURE TO RESPOND

If the Tribe fails to meet the deadlines set forth herein, the CTM may:

- A. contact the Tribe directly by any means, in order to inquire as to the delay and seek its cure;
- B. notify the Mediation Team and seek the Mediation Team's assistance in securing a response from the Tribe; or
- C. complete its review of the site to the best of its ability without Tribal input and notify the FCC that the Tribe failed to meet the deadlines as set forth herein, with a copy of such notice sent to the governmental leader of the Tribe and the Tribal official responsible for historic preservation. Such a failure on the part of the Tribe does not absolve the FCC or the CTM of its historic preservation responsibilities under Federal law.

V. INADVERTENT FINDS

A. CTM Responsibility. In the event of an inadvertent find of cultural remains, and/or artifacts, and/or human remains, and associated grave goods which potentially may be associated with the Tribe, the CTM or its Contractor shall: (1) cease construction immediately; (2) take reasonable and immediate steps to protect the site from environmental destruction, vandalism, and/or theft; (3) ensure the confidentiality of the site; (4) contact a source of technical expertise (e.g., the original archaeological compliance firm, or a forensic anthropologist or pathologist in the case of human remains), in order to confirm the find; (5) if the remains or artifacts are, or have the potential to be, Native American, the CTM or its Contractor shall notify the Tribe's historic preservation officer immediately by telephone; and (6) follow up within three days of telephone notification with written notification by first class U.S. mail or overnight courier. In the event that human remains are uncovered, the CTM also shall be responsible for complying with any and all state laws regarding the discovery of human remains.

B. Tribal Response. The Tribe shall have the opportunity to make a written determination of its desires concerning the inadvertent find, including the disposition of any human remains and associated grave goods, and to make physical disposition of the human remains and associated grave goods within the traditional cultural requirements of the Tribe. In the event that these items have cultural significance to more than one Tribe, the Tribe agrees to confer with the other interested Tribes regarding the appropriate disposition of these remains and/or artifacts. In the event that the land is owned by an entity or individual other than the CTM, the CTM shall still solicit, in writing, comments from the Tribe. The Tribe shall be obligated

to respond as quickly as practicable in order to minimize the CTM's project delay, but in no case later than seven days after written notice has been received by the Tribe's historic preservation officer. Except as otherwise provided in this paragraph, the Tribe's response shall follow the provisions of Section II.D.

C. Compliance with the Law. In the event of an inadvertent find the CTM shall comply with all pertinent Federal and state laws and regulations including, but not limited to, the National Historic Preservation Act, Native American Graves Protection and Repatriations Act, Archaeological Resources Protection Act, American Indian Religious Freedom Act, National Environmental Protection Act, and Executive Order 13007—Indian Sacred Sites.

VI. CO-LOCATION

A. Overview. Co-location of antennas constitutes an impact upon a site, although the scope of that impact can vary widely. Tribes are concerned about any impact that could affect properties of cultural and religious significance to a Tribe.

B. Expedited Review for Co-Location(s) at a Site for which the CTM previously has received a "No Adverse Impact Determination" from the Tribe. Expedited review for co-location(s) may be available for sites that previously have been reviewed under these Protocols and for which the CTM can demonstrate that it has received either an Adverse Impact Determination, No Adverse Impact Determination, No Interest Determination, No Current Interest Determination, or Deferral, from the Tribe. In such a circumstance, the CTM shall provide a copy of the Tribe's original determination letter, along with documentation (sketches or working drawings) indicating clearly the construction process and methods to be employed in co-locating the new array. The Tribe shall have 30 days to respond, in accordance with the procedures of Section II, above. It shall be the expectation of the parties that, unless the co-location is determined to have an Adverse Impact, the Tribe shall expedite review at a reduced fee, as provided in the fee schedule. (See: X, "Fees.")

C. Co-location Review for a Site not Previously Submitted for Tribal Review. If the co-location site previously has not been submitted for Tribal review under these Protocols, the CTM shall submit to the Tribe a Request for Review Letter and Review Materials, as if the site were under original consideration, as per Section II, C, 1–8, above. In addition, the Review Materials must include construction drawings for the already constructed tower. If the Tribe determines that the original or subsequent construction already has had an adverse impact on property of cultural and religious significance to the Tribe, then the parties shall enter into discussions regarding practicable resolution (as per Section II, E, 1). If the parties are unable to reach such a resolution, then it shall be the responsibility of the FCC and/or the Advisory Council on Historic Preservation to enter into Consultation to resolve the issue (as per Section II, E, 2). With regard to the co-location, the Tribe shall have 30 days to respond in accordance with the procedures of Section II, above.

VII. IDENTIFYING TRIBAL LANDS

For the purpose of identifying where the Tribe may have an interest in a green-fields or co-location site, it shall be deemed a good faith effort for the CTM to request that information from the USET Tribal Lands Directory.

VIII. MULTIPLE TRIBAL INTEREST

These Protocols are applicable to the professional relationship between the CTM and an individual Tribe or multiple Tribes. In those cases where the site under review is situated on the ancestral lands of more than a single USET member Tribe, the CTM may rely upon these Protocols in order for each Tribe to make a determination regarding the site. It shall remain the responsibility of the CTM to contact each appropriate Tribe. It shall remain the prerogative of the Tribes to respond individually, defer to one another, or decline to review, as per Section II, D.

IX. CONFIDENTIALITY ISSUES

A. CTM Concerns. Both the CTM and the Tribe have substantial confidentiality concerns. The CTM considers potential site locations to be proprietary business information. The Tribe agrees to keep confidential all material it receives from the CTM regarding the location of a cell tower site and related business information, except where disclosure is authorized in writing by CTM or otherwise required by law. The Tribe stipulates that it has no way of knowing what information is considered to be proprietary by the CTM and what is not. Consequently, the Tribe agrees to treat the information exchanged in the course of Requests for Reviews as confidential, except where the CTM authorizes the disclosure in writing, or where it is otherwise required by applicable law.

B. Tribal Concerns. The Tribe considers the location of many properties of cultural and religious significance to be proprietary cultural information, and seeks confidentiality in order to protect those properties. The CTM shall not disclose information it has acquired, whether from the Tribe or from another source, that relates to properties of cultural and religious significance to the Tribe, except where disclosure is authorized in writing by the Tribe or otherwise required by law. The parties understand that there may be some circumstances in which the Tribe cannot divulge to the CTM the exact nature or location of a Tribal cultural or religious property. In such circumstances, the Tribe shall endeavor, in good faith and to the extent consistent with its need for confidentiality and Tribal custom and/or law, to provide as much relevant information as possible to the CTM. The CTM stipulates that it has no way of knowing what information is considered to be proprietary by the Tribe and what is not, despite the fact that U.S. governmental agencies have unilaterally chosen to disclose Tribal information in the past. Consequently, the CTM agrees to treat the information exchanged in the course of Requests for Reviews as confidential, except where the Tribe authorizes disclosure in writing, or where it is otherwise required by applicable law.

X. FEES

Tribal fees for providing these professional review services to the CTM shall be based upon a fee schedule that reflects the uniqueness of the expertise, the complexity of the task, the labor-intensive nature of the work, and the resources needed to address the issue. The following fee schedule is proposed as fair and equitable.

Standard Review. Tribe engages in a standard review of the site, based upon a complete Review Materials package. Cost: \$—

Extended Review. Tribe needs to undertake a more extended review which could include a site visit. The cost of a site visit, including travel, per diem at the Federal rate, and a review fee of \$— per day for the Tribe's historic preservation officer, traditional cultural practitioner, or other designated representative, shall be borne by the CTM, in addition to the Standard Review fee (above).

Co-Location Review: Tribe has reviewed the original construction and issued a determination of No Adverse Impact. Cost: \$—

Co-location Review: Tribe has not reviewed original construction. Cost: \$—, same as Standard Review fee, above.

Inadvertent Find Fees: The CTM shall compensate the Tribe for out-of-pocket expenses (including, but not limited to, travel) associated with reviewing an inadvertent find.

Negotiated Fees. The parties may agree in writing to such other fees as they jointly deem warranted.

XI. DISPUTE RESOLUTION

A. Mediation. Except as otherwise provided by mutual written agreement of the parties, the parties shall resolve disputes under these Protocols through mediation. The parties agree to use the USET-PCIA Mediation Team to assist in mediating a dispute over any aspect of these Protocols including a determination of an Adverse Impact or the terms of a Resolution Plan. By mutual consent, the parties may select any other mediating entity. The Mediation Team shall consist of 4 or 6 individuals; half selected by USET and half selected by PCIA. The Mediation Team shall serve as a mediator for the Tribe and the CTM regarding disputes under these Protocols. The Mediation Team shall have no enforcement authority, but shall encourage the parties to reach agreement consistent with their own interests and the goals of these Protocols. The Mediation Team shall endeavor to meet with the parties and seek resolution of the dispute within 30 days of receiving notice of the dispute from one of the parties. [The Tribe shall pay the costs of the mediators associated with USET in accordance with such terms as the Tribe shall reach with USET. The CTM shall pay the costs of the mediators associated with PCIA in accordance with such terms as the CTM shall reach with PCIA.]

B. Failure of Mediation. In the case of sites concerning which the Tribe and the CTM are unable to reach any agreement satisfactory to both parties, the dispute shall revert to the head of the FCC as the Federal agency responsible for complying with Section 106 of the National Historic Preservation Act, and the Advisory Council on Historic Preservation if either party deem necessary. It will then be the responsibility of the FCC to complete Consultation, on a government-to-government basis, with the specific Tribe, and to reach a decision regarding the siting and to justify its decision in writing. At the time of its decision, it shall remain the prerogative of either party, the FCC or the affected Tribe, to request formally the entry of the Advisory Council on Historic Preservation into the Consultation process. Further, no language in these Protocols or in the process of Consultation or in the rec-

ommendations of the ACHP shall be construed as limiting the rights of the original parties to seek legal redress in a court of competent jurisdiction.

XII. AMENDMENT

These Protocols may only be amended by agreement in writing of the parties hereto. The parties agree to meet at one-year intervals to discuss the effectiveness of these Protocols and the need for any amendments.

Programmatic Agreement Among The Louisiana Army National Guard, The Alabama Coushatta Tribe of Texas, The Caddo Tribe of Oklahoma, The Chitimacha Tribe of Louisiana, The Coushatta Tribe of Louisiana, The Jena Band of Choctaw Indians, The Mississippi Band of Choctaw Indians, The Quapaw Tribe of Oklahoma, The Tunica-Biloxi Indians of Louisiana, The Louisiana State Historic Preservation Officer, The Louisiana State Archaeologist and The Advisory Council on Historic Preservation Regarding Undertakings that May Affect Historic Properties

WHEREAS, the Louisiana Army National Guard (LAARNG) has a Federal mission which includes federal military training and related activities on lands it owns, leases or controls in the State of Louisiana; and,

WHEREAS, the LAARNG has determined that its Federal mission and related activities may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places (National Register); and,

WHEREAS, the LAARNG has consulted with the Advisory Council on Historic Preservation (ACHP), the Louisiana State Historic Preservation Officer (LASHPO), and the Louisiana State Archaeologist (LASA); and,

WHEREAS, the LAARNG has determined that its Federal mission and related activities may have an affect on properties included in or eligible for inclusion in the National Register that are of religious and cultural significance to the Alabama Coushatta Tribe of Texas, the Caddo Tribe of Oklahoma, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Jena Band of Choctaw Indians, the Mississippi Band of Choctaw Indians, the Quapaw Tribe of Oklahoma and the Tunica-Biloxi Tribe of Louisiana (Signatory Tribes); and,

WHEREAS, the LAARNG in recognition of the sovereignty of each of the Signatory Tribes, has consulted with these Tribes on a government-to-government basis in accordance with Section 800.14(f)(2)(c)(2) of the ACHP's regulations (Protection of Historic Properties 36 CFR Part 800) and Executive Order 13175: Consultation and Coordination with American Indian Tribal Governments, and invited them to be signatories to this Programmatic Agreement (PA); and,

WHEREAS, the LAARNG and each Signatory Tribe has entered into a Memorandum of Understanding (MOU) on or after May 7, 1998; and,

WHEREAS, the Signatory Tribes and the LAARNG have adopted the "Policy Regarding Consultation, American Indian Cultural Sites, Cultural Resource Investigation and Procedures, and American Indian Human Remains" (Policy) on or after January 6, 2000.

WHEREAS, the LAARNG and the Signatory Tribes, through a MOU, solemnly created an American Indian Keepsake Heritage Cemetery on or after October 13, 1999; and,

WHEREAS, the signatories to this PA recognize that only the Signatory Tribes possess the expertise to identify and evaluate historic properties of religious and cultural significance; and,

WHEREAS, the signatories to this PA recognize the necessity of consultation with the Signatory Tribes and the authority of the LAARNG and the LASHPO to make determinations with regard to cultural sites eligible for the National Register; and,

WHEREAS, all signatories to this PA recognize that there may be cultural prohibitions against tribal members divulging certain information about properties of religious and cultural significance and agree to keep confidential to the fullest extent of the law any such information that may be revealed in the course of consultation; and,

WHEREAS, through implementation of this PA, the LAARNG intends to meet its responsibilities, pursuant to Section 101(d)(6)(B) of the National Historic Preservation Act (NHPA), 'to consult with Indian tribes that attach religious and cultural significance to historic properties,' in carrying out its mission; and,

WHEREAS, historic properties, including but not limited to, archaeological sites, locations, and other properties in which features and cultural items are of American Indian origin, or in which there are American Indian burials, or Traditional Cultural Properties and/or Sacred Sites which are of religious and cultural significance

to the Signatory Tribes, for purposes of this PA, shall be referred to as American Indian Cultural Sites (AICS); and,

WHEREAS, AICS shall be afforded the same legal standing and protection by all applicable Federal or state statutes, regulations, policies, Presidential Memoranda, or Executive Orders, including, but not limited to the American Indian Religious Freedom Act (AIRFA), Executive Order 13007, Executive Order 13175, Executive Order 12898, Executive Order 11593, Department of the Army Pamphlet 200-4: Cultural Resources Management, Army Alternative Procedures for Section 106 and/or other Federal agency alternate procedures, the Louisiana Unmarked Human Burial Sites Preservation Act (LA R.S.8:671, et seq.), and the Louisiana Archaeological Resources Act (LA R.S. 41: 1601-1614); and,

WHEREAS, the definitions given in Appendix A are applicable throughout this PA; and,

WHEREAS, the Federal and state statutes, regulations, policies, Presidential Memoranda, or Executive Orders and related documents listed in Appendix B are applicable throughout this PA;

NOW, THEREFORE, the LAARNG, the Signatory Tribes, the ACHP, the LASHPO, the LASA agree that the administration, planning, and conduct of the LAARNG's Federal mission and related activities shall be carried out in accordance with the following stipulations to satisfy the LAARNG's Section 106 requirements for undertakings that may affect AICS and other historic properties.

Stipulations

The LAARNG shall ensure that the following measures are carried out:

I. Consultation with the Signatory Tribes

A. The LAARNG shall consult with the LASHPO, the LASA and the Signatory Tribes early on in the planning process and throughout the Section 106 review regarding any activity or undertaking that might affect an AICS and other historic property. Such consultation shall be conducted in the following manner:

1. Initial consultation by telephone followed by written confirmation.
2. Written correspondence documenting the consultation process for the administrative record.
3. Face-to-face consultation meetings for obtaining advice or the opinions.

B. Consultation with the Signatory Tribes

1. The LAARNG shall consult with each Signatory Tribe on a government-to-government basis in recognition of Tribal sovereignty.
2. The LAARNG shall establish and maintain the position Coordinator for Native American Affairs (CNAA) to serve as liaison and coordinator of affairs between the LAARNG and the Signatory Tribes. The CNAA shall advise and provide guidance to the LAARNG concerning Native American affairs and will facilitate consultation with the Tribes on a government to government basis. The LAARNG shall ensure that the CNAA be provided with documents relating to the Signatory Tribes, AICS and other historic properties, and other resources as the CNAA may need to carry out the duties of the position. In addition, the LAARNG shall ensure that the CNAA participates in Section 106 consultation with the Signatory Tribes.

C. The LAARNG shall consult with the Signatory Tribes, the LASHPO and the LASA regarding the timing, location and agenda of consultation meetings and ensure that advance written notification to the Signatory Tribes for such meetings is done in a timely manner that is satisfactory to the Tribes and the LAARNG.

D. Designated representatives of the LAARNG, including the Unit Environmental Compliance Officer (UECO), the CNAA, official representatives of the Signatory Tribes, the LASHPO, the LASA and the ACHP, if participating, shall consult in good faith and in the manner defined in Executive Order 13175, Executive Order 13007, the MOU, the Policy, this PA and in accordance with those authorities listed in Appendix B.

II. Initiating the Section 106 Review Process

A. The LAARNG shall determine whether a proposed action is an undertaking and therefore subject to the Section 106 Review Process.

B. In consultation with the LASHPO, the LASA and the Signatory Tribes, the LAARNG shall identify any other consulting parties entitled to participate in the Section 106 process in order to determine if the proposed undertaking has the potential to affect AICS and other historic properties.

C. The LAARNG shall invite any local government to participate in the consultation process that has jurisdiction over an area in which the effects of an undertaking may occur.

D. The LAARNG shall ensure that consultation with other consulting parties, including local governments, shall not include the dissemination of information that might risk harm to the AICS or that might impede the use of a religious or Sacred Site by any of the Signatory Tribes in accordance with Section 304 of the NHPA and with those authorities as listed in Appendix B.

III. AICS and other historic properties

A. Scope of Identification

Site discovery, recordation, preservation, protection, and avoidance shall be the standard operating procedure regarding AICS and other historic properties.

1. Determining the Scope of Identification for AICS and other historic properties:

The LAARNG shall consult the LASHPO, the LASA and the Signatory Tribes to determine the area of potential effects; to review information on AICS and other historic properties in the area; and, to seek information from others likely to have knowledge of such properties in the area.

2. Identifying AICS and other historic properties is based on the information gathered in Stipulation III.A.1. The LAARNG in consultation with the Signatory Tribes, the LASHPO and the LASA shall develop and implement an appropriate and competent non-destructive investigative cultural survey to locate AICS and other historic properties. The LAARNG shall ensure that:

- a. All such archaeological surveys conform to the minimum survey standards of the Louisiana Division of Archaeology;
- b. Remote sensing is emphasized and recommended;
- c. GPS coordinates along with all other geographical and site information required by the State of Louisiana is included along with photographs that relate the site to its physical location.

3. Data Collection:

- a. When necessary for determining significance, artifacts removed for diagnostic purposes and /or site verification shall be limited to a minimum. Refer to Stipulation IV.
- b. Rather than intensive collecting of artifacts, recordation in place is the preferred practice.
- c. Artifacts shall be photographed and/or drawn in place with sufficient detail as to show diagnostic attributes.
- d. The LAARNG shall ensure that the removal of cultural items from an AICS and other historic property adheres to those authorities as listed in Appendix B.
- e. The LAARNG shall ensure that the removal of cultural items from an AICS and the disposition of those items require consultation with and agreement by a majority of the Signatory Tribes.

B. Evaluation of AICS and other historic properties

- 1. The LAARNG, the LASHPO and the LASA shall evaluate properties identified through a survey in accordance with 36 CFR Section 800 (4)(c).
- 2. The LAARNG shall provide the Signatory Tribes the opportunity to evaluate all historic properties to determine if such properties are of religious and cultural significance and are considered to be an AICS.
- 3.a. If a survey, conducted for cultural resource management purposes, results in the identification of properties that are of undetermined eligibility and will not be affected by a proposed undertaking, but are of religious and cultural significance to one or more of the Signatory Tribes, the LAARNG in consultation with the Signatory Tribes, shall develop and implement a management plan for the properties in accordance with Stipulation VII of this PA.
- b. If a survey conducted for cultural resource management purposes, results in the identification of other historic properties that are of undetermined eligibility for the National Register, the LAARNG, in consultation with the LASHPO, the LASA, and the UECO shall develop and implement a management plan for the properties.

C. Assessing the effects of a proposed undertaking on AICS

The LAARNG, the LASHPO and the LASA, in consultation with the Signatory Tribes, shall determine if the proposed undertaking alters, directly or indirectly, any characteristics that qualify the property for inclusion in the National Register or are of religious and cultural significance to the Signatory Tribe(s). Alterations that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association may be considered to be adverse effects.

1. The LAARNG shall consider all qualifying characteristics of a historic property, including those qualities for which the property is of religious and cultural significance to a Signatory Tribe(s).
2. The LAARNG and the LASHPO shall determine if one or more of the examples of adverse effects (36 CFR Section 800) apply, including threats from unavoidable alteration, physical destruction or damage. Signatory Tribes shall be consulted when alterations would adversely affect an AICS.
3. If the LAARNG, the LASHPO and the LASA determine that a proposed undertaking will not adversely affect an AICS or other historic properties after consultation with the Signatory Tribes, the LAARNG shall implement the undertaking as planned. If, at any time, prior to or during implementation, the undertaking is modified, the LAARNG shall consult the Signatory Tribes, the LASHPO, and the LASA regarding the modification and its effect on historic properties.

D. Resolution of adverse effects to AICS and other historic properties

1. If the LAARNG in consultation with the Signatory Tribes and the LASHPO, determines that a proposed undertaking will adversely affect an AICS and/or other historic properties, the LAARNG shall consult with the Signatory Tribes and the LASHPO to develop and implement a plan to avoid or minimize adverse effects to the AICS and other historic properties through project redesign or other means.
2. If the LAARNG, the Signatory Tribes and the LASHPO agree on conditions that successfully avoid or adequately minimize adverse effects to an AICS and other historic properties, the LAARNG shall implement the proposed undertaking in accordance with the agreed-upon conditions.
3. If the LAARNG, the Signatory Tribes and the LASHPO agree that adverse effects cannot be avoided or adequately minimized through project redesign or other means, the LAARNG, in consultation with the Signatory Tribes, and the LASHPO, shall develop and implement a plan to mitigate the adverse effects of the proposed undertaking on AICS and other historic properties.
4. If the LAARNG, the Signatory Tribes, the LASHPO and the LASA determine that appropriate mitigation of an AICS or other historic property is site data recovery, then, prior to any site data recovery, the LAARNG shall ensure that a research design, a data recovery plan and timetable is developed and implemented in consultation with the Signatory Tribes, the LASHPO and the LASA.
5. In accordance with the regulations of the ACHP (36 CFR 800), the LAARNG, the LASHPO, the Signatory Tribes may at any time request the ACHP to participate in the consultation.

IV. Permits

A. The LAARNG shall ensure that consultation with the Signatory Tribes occurs prior to the application of a permit from the State Archaeologist, acting on behalf of either the Louisiana Division of Archaeology, the Louisiana Survey and Antiquities Commission, or the Louisiana Unmarked Burial Sites Board, as may be required by the nature of a proposed undertaking.

B. The LAARNG, Tribal, or other consulting parties' concerns and restrictions, if any, shall be relayed to the State Archaeologist prior to the issuance of any permit.

C. The LAARNG shall ensure that all necessary permits are obtained prior to carrying out the site data recovery plan. Permittees must have a research design approved by the LAARNG and the LASA—acting, as defined by the nature of the proposed undertaking, on behalf of either of the Louisiana Division of Archaeology, the Louisiana Survey and Antiquities Commission, or the Louisiana Unmarked Burial Sites Board.

V. Data Recovery

A. The site data recovery plan, based on firm background data, sound planning, and accepted archaeological methods, shall specify, at a minimum:

1. The property, properties, or portions of properties where data recovery is to be carried out;
 2. The research questions to be addressed through data recovery, with an explanation of their relevance and importance;
 3. The methods to be used, with an explanation of their relevance to the research questions;
 4. The methods to be used in analysis and data management;
 5. The proposed disposition of recovered materials and records;
 6. The proposed methods by which the Signatory Tribes, the LASHPO, and the LASA will be kept informed of the progress of the data recovery and be afforded the opportunity to participate;
 7. A proposed schedule for the submission of progress reports to all relevant parties; and,
 8. The procedures for addressing the discovery of human remains or funerary objects in accordance with Stipulation IX of this PA, as applicable.
- B.1. The LAARNG shall ensure that the data recovery plan is implemented by or under the direct supervision of a person(s) meeting the minimum qualifications for the Secretary of Interior's Qualifications Standards (48 CFR 44738–44739) and the minimum qualifications for Professional Archaeologists as set out in Title 25 Section 102 of the Louisiana Administrative Code.
2. When the LAARNG requests assistance from a Signatory Tribe(s) to aid in the identification, evaluation, assessment of effects, and treatment of historical properties of traditional religious and cultural importance, such Signatory Tribe(s), their representatives, Traditional Cultural Authorities and/or Practitioners or other religious leaders need not meet the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738–44739) and the minimum qualifications for Professional Archaeologists as set out in Title 25 Section 102 of the Louisiana Administrative Code.
- C. The LAARNG shall ensure that adequate time and funding are provided in order to carry out all aspects of the data recovery plan.
- D. The LAARNG shall submit the data recovery plan with supporting documentation to the Signatory Tribes, the LASHPO, the LASA, and other consulting parties for review and comment for a period of not less than thirty (30) working days.

VI. Curation

A. Artifacts Recovered during Identification Surveys and Data Recovery

1. The LAARNG shall follow curation standards set forth in 36 CFR Part 79 and the curation standards of the Louisiana Division of Archeology. Cultural items including human remains, field notes, project-related slides and photographs, analysis notes, or other materials generated during an identification survey, test excavation, data recovery, or related project shall be curated in a state approved curation facility. However, should a Signatory Tribe have a concern with the curation items related to an AICS, the LAARNG and the CNAA shall consult with the Signatory Tribe(s) to ensure that the treatment of the curated items is acceptable with tribal practices and traditions.
2. The LAARNG shall ensure that documentation, including geographical and site information, is curated with cultural items, including human remains, and is made available to the designated representatives of the LAARNG, the LASA, and the official representatives of the Signatory Tribes if cultural items are from an AICS. Site location information shall be withheld from public disclosure in accordance with Section 304 of the NHPA, LA RS 41:1609, and in accordance with those authorities listed in Appendix B.
3. American Indian human remains and associated funerary items originating from LAARNG lands shall be curated in consultation with and approval from the majority of the Signatory Tribes.
4. When American Indian human remains and associated funerary items are not from LAARNG lands, the tribe(s) having "right of possession" to those cultural items may request temporary curation through the LAARNG prior to burial in the American Indian Keepsafe Heritage Cemetery.
5. Human remains and associated funerary items will be curated together.
6. The LAARNG shall consult with the Signatory Tribes prior to the accession or the deaccession of any cultural items recovered from an AICS.

VII. Preservation and Protection of AICS and other historic properties:

The LAARNG, in consultation the LASHPO, the Signatory Tribes, or other consulting parties, shall develop a plan for the preservation of AICS and other historic properties that are identified pursuant to this PA and that may or may not be af-

ected by a proposed undertaking. The plan shall include measures for the long-term protection of such properties including, but not limited to:

1. Camouflaging, where warranted, with soil and/or protective cover by utilizing native flora or other natural and native materials.
2. Posting "Off Limits" signs or other appropriate warning signage, fencing, and/or the placement of remote sensing monitoring devices, as is site appropriate.
3. Systematic patrols of AICS and other historic properties by trained, qualified, and authorized LAARNG personnel shall include periodic monitoring of the condition of such properties and the development and implementation of corrective measures that may include erosion control, restoration, or other means of preservation and protection.
4. Development of procedures and guidelines for the conservation and preservation of historic structures and properties.

VIII. Documenting and Reporting Requirements

A. The LAARNG shall provide all cultural resource investigation/archaeological reports, including bibliographies, on LAARNG controlled properties, to the Signatory Tribes, designated officials of the LAARNG, the LASHPO, and the LASA.

B. The LAARNG shall ensure that the Signatory Tribes, designated officials of the LAARNG, the LASHPO, and the LASA are provided timely progress/activity reports on the implementation of the data recovery and/or as each survey session is complete.

C. Reports shall conform to the Louisiana Division of Archaeology's Standards for Archaeological Reports and shall be submitted to the LASHPO, the LASA, designated officials of the LAARNG, the Signatory Tribes and other consulting parties for a review and comment. Recipients of the report shall have forty-five (45) days from receipt of the report to provide comments to the LAARNG.

D. Precise location data shall only be provided to Signatory Tribes, designated officials of the LAARNG, the LASHPO, and the LASA in a separate attachment to the report and shall otherwise be withheld from disclosure pursuant to Section 304 of the NHPA, Executive Order 13007 and other authorities as listed in Appendix B.

E. The LAARNG shall ensure that a final report is produced in a timely manner for all data recovery efforts and it shall be provided to designated officials of the LAARNG, the Signatory Tribes, the LASHPO and the LASA.

IX. Inadvertent Discovery

A. In the event of an inadvertent discovery, that may be eligible for the National Register, which may include human remains, associated funerary objects, or the indications of a burial, that is encountered during an undertaking, the LAARNG shall ensure that all activity in the general area ceases, the area is secured and a reasonable effort is made to protect the discovery including any human remains and any associated funerary objects.

B. If human remains are discovered, the individual(s) who made the discovery shall immediately notify law enforcement officials, the LASA, the appropriate LAARNG officer(s), including the CNAAs and the UECO.

1. If such remains constitute a crime scene, all applicable laws and procedures will apply.
2. If human remains are deemed to be of American Indian origin, the LAARNG shall notify the Signatory Tribes, by telephone, within 24 hours of the discovery, followed by written notification.
3. If human remains are historic and not of American Indian origin, the LAARNG shall consult with the LASA to identify consulting parties.

C. For and inadvertent discovery, the LAARNG shall implement the following procedures:

1. An immediate survey or resurvey of the general area shall be instituted by an archaeologist in the presence of designated officials of the LAARNG and if of American Indian origin, a designated representative(s) of the Signatory Tribes and the CNAAs.
2. Within five (5) working days of receipt of written notification, the LAARNG shall consult with all relevant parties to determine the appropriate course of action with regard to the human remains and accompanying artifacts. The appropriate course of action shall be limited to:
 - a. Protection from further disturbance
 - b. Repair of damage to site
 - c. Avoidance

- d. Removal of human remains and associated funerary objects
- 3. If the LAARNG, after consultation, determines that protection, avoidance, or repair are not possible, then disinterment shall be conducted in accordance with methods and procedures acceptable to the relevant parties.
- 4. American Indian human remains shall not be drawn or photographed without prior consultation and agreement from a majority of the Signatory Tribes.
- 5. The LAARNG may authorize activity in the direct discovery areas to resume in less than thirty (30) days, if the following conditions are met:
 - a. The relevant parties have determined an “appropriate course of action” by the adoption of an expedited recovery plan for excavation or an agreed-upon alternative. For an AICS, a majority of Signatory Tribes will need to concur on the recovery plan or an agreed-upon alternative.
 - b. Implementation and completion of a recovery plan or agreed-upon alternatives.
 - c. Development of a time line procedure depending on the significance of the site.
 - d. Written confirmation by the LAARNG that the above requirements have been met.

X. Intentional Excavation of Human Remains

The LAARNG shall ensure that removal or disinterment of a burial and human remains occurs only after all feasible alternatives have been considered in consultation with the LASHPO, the LASA, designated LAARNG officials, the Signatory Tribes, or other relevant parties. If the LAARNG, the LASHPO, the LASA, and the Signatory Tribes (when the site is an AICS), or other relevant parties concur that removal or disinterment is the only feasible alternative, the LAARNG shall ensure that:

- 1. Disinterment is carried out in accordance with the concurrence of, and in the presence of, a designated representatives of the LAARNG and, if relevant, a designated representative(s) of the Signatory Tribes or other relevant parties. Disinterment shall be carried out in a sensitive manner respectful of the customs and beliefs of the deceased.
- 2. There is proof of consultation, in accordance with Stipulation I.C., through issuance of a required permit.

XI. Reinterment

A. Reinterment of American Indian human remains from LAARNG lands shall be in the American Indian Keepsafe Heritage Cemetery at Camp Beauregard or, if conditions warrant, as close to the original burial site as possible. The location of the reinterment shall be determined in consultation with a majority of the Signatory Tribes.

B. When reinterment concerns American Indian human remains not from LAARNG lands, the tribe(s) with “rights of possession” of the human remains and associated funerary objects shall consult with the official designates of the LAARNG for reinterment in the American Indian Keepsafe Heritage Cemetery.

C. The LAARNG shall consult with relevant parties when human remains that are not of American Indian origin and are from LAARNG lands for a determination of a reburial site.

XII. Scientific Analysis of Human Remains

A. The LAARNG shall ensure that any proposal with regard to scientific investigation or analysis of human remains will warrant approval from relevant parties. Written approval from the majority of the Signatory Tribes is required before scientific investigation or analysis on American Indian human remains and/or associated funerary items.

B. The LAARNG shall ensure that extensive scientific research, including intrusive or destructive analysis, will not be conducted on burials, human remains, or associated funeral objects emanating from LAARNG lands without the express written approval from the relevant parties, including the Signatory Tribes. The exception to this is when forensic information is necessary with regard to a crime scene.

C. The LAARNG shall ensure that those Signatory Tribes that desire to conduct religious ceremonies with regard to American Indian human remains and funerary objects are afforded that opportunity. [AIRFA: 42U.S.C.SECTION 1996(94)]

D. The LAARNG shall ensure that documentation American Indian human remains, associated funerary objects, or cultural items is in accordance with the standards and procedures of the Louisiana Division of Archaeology.

XIII. Review of Implementation

A. The LAARNG, the Signatory Tribes, the LASHPO, and the LASA shall meet annually to review implementation of the terms of this PA and determine whether revisions are needed. To facilitate such consultation, the LAARNG shall report to the Signatory Tribes, the CNAA, and the LASHPO all activities carried out pursuant to this PA. Such reporting shall be in a form acceptable to these parties. If these parties determine that revisions are needed, the LAARNG, the Signatory Tribes, and the LASHPO shall consult in accordance with 36 CFR Section 800.14(b) and Executive Order 13175 to make such revisions.

B. Any of the Signatory Tribes or the LASHPO may request that the ACHP review the LAARNG's implementation of the terms of this PA. If the ACHP determines that the terms of this PA are not being carried out, or if the agreement is terminated, the LAARNG shall comply with 36 CFR 800 Sections 3 through 7 with regard to individual undertakings covered by this agreement.

XIV. Administrative Procedures

A. The LAARNG, in consultation with the Signatory Tribes, the LASHPO, and the LASA shall develop standard conditions for inclusion in all cultural resource contracts and work orders that include, but are not limited to, cultural resource surveys, investigations, National Register evaluations, site protection, and mitigation/data recovery. In addition, the LAARNG shall provide the LASHPO, the LASA, and the Signatory Tribes a description of the area of potential effects, a summary of the proposed work, and attached maps. Previous survey testing and eligibility to the National Register shall be included.

B. The LAARNG shall provide sufficient information, including contact names of designated LAARNG officials, to all contractors and staff regarding procedures for an inadvertent discovery of historic properties, human remains, and cultural items and the penalties for inappropriate actions under the applicable Federal and state laws and regulations in all contracts, work orders, and related documents with copies to the UECO and the CNAA.

C. The LAARNG, in consultation with the LASHPO and the LASA shall develop standard operating conditions for inclusion in all contracts, work orders, and other related documents for activities that might result in ground or habitat disturbance.

D. Standard operating procedures shall be attached as appendices to contracts, work orders and other related documents.

XV. Dispute Resolution

Should any signatory to this PA object within forty-five (45) days from receipt of any plans provided for review, the LAARNG shall consult with the objecting party to resolve the objection. If the LAARNG determines that the objection cannot be resolved, the National Guard Bureau (NGB) shall request further comments of the ACHP pursuant to 36 CFR Section 800.7(a)(1). Any ACHP comment provided in response to such a request shall be taken into account by the NGB and the LAARNG in accordance with 36 CFR Section 800.7(c)(4) (i)(ii)(iii) with reference only to the subject of the dispute. The LAARNG's responsibility to carry out all actions under this PA that are not the subject of the dispute will remain unchanged.

XVI. Null and Void Provision

In the event any provision of this PA shall be deemed contrary to or in violation of any applicable existing law or regulation of the State of Louisiana or the United States of America or of the Signatory Tribes affixing their signatures hereto, only the conflicting provision shall be deemed null and void, and the remaining provisions of this PA shall remain in effect.

Execution and implementation of this PA evidence that the LAARNG has satisfied its Section 106 responsibilities for all individual undertakings carried out pursuant to this PA.

LOUISIANA ARMY NATIONAL GUARD

Major General Bennett C. Landreneau, the Adjutant General

ALABAMA COUSHATTA TRIBE OF TEXAS

Kevin Battise—Chairman

CADDO TRIBE OF OKLAHOMA

LaRue Parker, Chairwoman

CHITIMACHA TRIBE OF LOUISIANA

Alton D. LeBlanc, Jr., Chairman

COUSHATTA TRIBE OF LOUISIANA

Lovelin Poncho, Chairman

JENA BAND OF CHOCTAW INDIANS

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ADVISORY COUNCIL ON HISTORIC PRESERVATION
 John M. Fowler, Executive Director
LOUISIANA STATE HISTORIC PRESERVATION OFFICER
 Laurel Wyckoff, State Historic Preservation Officer
LOUISIANA STATE ARCHAEOLOGIST
 Thomas Hales Eubanks, PhD

Appendix A: Definitions

The following definitions apply throughout this PA:

American Indian Cultural Resource: shall mean any material remains of human life, activities religious or ceremonial practices. Cultural resources shall include, but not be limited to, pottery, basketry, bottles, weapons, weapon projectiles, tools, structures, or portions of structures, pit houses, rock paintings, certain plants, rock carvings, intaglios, viewscapes, graves, human remains, or any portion or piece of the forgoing objects.

American Indian Cultural Sites: shall mean historic properties, including but not limited to, archaeological sites, locations, and other historic properties in which features are culturally important or items that are of American Indian origin, or in which there are American Indian burials, or Traditional Cultural Properties and/or Sacred Sites which are of religious and cultural significance to the Signatory Tribes.

American Indian Keepsafe Heritage Cemetery: shall mean those LAARNG lands, which are designated and maintained by the LAARNG as cemeteries under Louisiana Law for the secure and permanent reinterment of the human remains and funerary objects or sacred items of American Indian Tribes.

Area of Potential Effects: means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of Traditional Cultural Properties and/or Sacred Sites which are of religious or cultural importance to any Signatory tribe, if any such properties exist.

Burial: means the placement of a dead body or bodies below, on, or above the surface of the earth by specific intent, accidental or undetermined reason. Burial methodologies may vary. Remains may be whole, partial, cremated, disarticulated or have been exposed to, or by, the elements, and burial may be evidenced only by a stain in the earth and/or by funerary objects.

Burial site: means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which, as a part of the death rite, event or ceremony of a culture, human remains are deposited by specific intent, accidental or undetermined reason. It is understood that many American Indian burial sites do not fall within a non-Indian definition or concept of gravesite or burial.

Consultation: means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement regarding matters arising in the Section 106 review process. Consultation is an important part of a cooperative effort and has as much to do with obtaining information as with providing information. Notification, which alerts parties of a pending agency action late in the planning process, is not consultation.

Coordinator for Native American Affairs: means that person who is to serve as a liaison and coordinator of affairs between a military organization and the Federally-recognized tribes that are culturally affiliated with those military lands owned, leased or controlled by the military organization. The CNAA shall advise and provide guidance to the military organization concerning Native American affairs and will facilitate consultation on a government to government basis.

Cultural affiliation: means that there is a claimed and shared tribal relationship culturally linked historically or prehistorically between a present day federally-recognized Indian tribe and an earlier people.

Cultural items:

- a. associated funerary objects: shall mean objects that, as a part of the death rite, occurrence or ceremony of a culture, are believed by any Signatory Tribe or other party to have been placed with individual or collective human remains either at the time of death, accidentally or on purpose, or later, except

that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

- b. unassociated funerary objects: shall mean objects that, as an element of the death rite, occurrence, or ceremony of a culture, are believed by any Signatory Tribe or other party to have been placed with human remains either at the time of death or later but have been removed from the human remains by whatever means or for whatever purpose.
- c. sacred objects: shall mean specific objects designated by a federally recognized tribe or by Traditional Cultural Authorities and Practitioners and/or other religious leaders acknowledged by a Signatory Tribe.
- d. cultural patrimony: shall mean an object having ongoing historical, traditional, cultural importance central to an American Indian group or culture itself, rather than property owned by an individual American Indian, and which therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe, and such objects, or object has been, or is, considered inalienable by such an American Indian Tribe.

Diagnostics: shall mean artifacts or cultural items, which may be used to aid identification as to cultural affiliation, cultural phases, or time periods.

Historic Properties: shall mean any pre-European contact or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places, including artifacts, records, and material remains related to such a property or resource. For purposes of this PA, historic properties that are of religious and cultural significance to the Signatory Tribes are referred to as American Indian Cultural Sites and which as such may be eligible for inclusion in the National Register of Historic Places.

Human remains: shall mean the physical remains of a human body of a person or persons of American Indian ancestry or other party, including but not limited to bones, teeth, hair, ashes, other remnant evidence thereof mummified or otherwise preserved soft tissues. Where human remains may have been incorporated into a funerary object, that object shall be considered a part of that particular burial or burials.

Inadvertent discovery: shall mean the unanticipated encounter or detection of American Indian Cultural Sites and/or other historic properties, human remains, funerary objects, sacred objects, or objects of cultural patrimony.

Indian tribe: means an Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians as stated in Federal statutes and more properly as defined most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the federally recognized Indian Tribe List Act. (1994)

Intentional excavation: shall mean a planned removal from an American Indian Cultural Site and other historic property, human remains, funerary objects, sacred objects, or objects of cultural patrimony.

Reinterment: shall mean the reburial, in accordance with the terms of this PA, MOU, the Policy, and tribal cultural and religious practices, in such a manner that the identity, location, and integrity of the human remains are maintained in accordance with Section 304 of the NHPA and those other authorities listed in Appendix B,

Relevant Parties: means those parties that have a particular interest in an AICS and other historic property who should be consulted with regard to an undertaking, inadvertent discovery, or an intentional excavation. These parties may be lineal descendants, or culturally affiliated, federally recognized Signatory Tribes, or have a vested interest in a specific undertaking.

Sacred Sites: refer to Executive Order 13007: Sacred Sites.

Traditional Cultural Property: means those properties whether tangible or intangible that are of religious and cultural significance to a specific tribe(s).

Undertaking: means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of the agency; those carried out with Federal financial assistance; those requiring a Federal permit, license, or approval; and, those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Appendix B

Authorities:

Executive Order 11593

Executive Order 12898

Executive Order 13007
 Executive Order 13175
 American Indian Religious Freedom Act
 Army Alternative Procedures for Section 106
 Army Regulation 200-4
 Archeological Resources Protection Act
 Department of Army Pamphlet 200-4: Cultural Resources Management
 Native American Graves Protection and Repatriation Act
 Louisiana Administrative Code: Title 25 Section 102
 Louisiana Archeological Resources Act (LA R.S. 41: 1601, et seq.)
 Louisiana Cultural Resources (LA Administrative Code, Title 25, Chapter 1.)
 Louisiana Unmarked Human Burial Sites Preservation Act (LA R.S. 8:671, et
 seq.)
 National Historic Preservation Act

Cell Tower Reviews:

To date the Mississippi Band of Choctaw Indians have received a *minimum* of about 400-500 requests to review cell tower construction in the states of Mississippi, Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina Tennessee and Missouri. All of these requests have come either directly from the companies building the cell towers themselves or from environmental contractors working for the companies building the towers. Many have virtually no locational information or maps included with the letter requesting review—but they do include a check off saying that there are no sites of religious or cultural importance to the tribe so that we can rubber stamp their requests!

FCC Sponsored Telecommunications Working Group

To the best of my knowledge this group was formed at least two years ago and has previously written one nation-wide programmatic agreement covering the National Historic Preservation Act (NHPA) Section 106 review of upgrades and expansions of existing cell towers. This PA was adopted with NO tribal involvement in it's drafting or tribal consultation about it's content.

Sometime in February I received a copy of a Public Notice issued by the FCC from a friend of mine who works for another federal agency who just happened to see it and thought I might be interested in it. It was a call for tribal involvement in the newly formed Sub-groups to the Telecommunications Working Group which were in the process of drafting yet another nation-wide programmatic agreement—this time covering the NHPA Section 106 review for the construction of NEW cell towers. I called the contact phone number listed in this public notice (since the email address listed was non-functioning!) and eventually got a reply to the message I left. I was told that while the public notice had been released, it had not at that time been mailed out to Tribes or in anyway distributed directly to tribes, but that it would be mailed out within a few days. To the best of my knowledge this public notice has yet to be distributed to tribes.

In response to my inquiry about the working groups I was added to what was then Subgroup number 3 which was subsequently combined with Subgroup number 4 and was informed that there was a joint conference call occurring THAT afternoon and given the information for joining it. I was emailed a copy of the draft document which Subgroup number 3 was working on—it was draft number 9 or 10. Having had little time to prepare for the conference call I nonetheless joined it to see what exactly was occurring in these calls. During this conversation whenever I voiced concerns over the language or policies being discussed which reflected the Tribal views of issues I was politely but pointedly either ignored or told that this was a document which was only going to govern the cell tower manufacturers and the SHPOs. The manufacturers were aware that they had an obligation to consult with tribes (not the FCC mind you, the manufacturers) and that they would therefore not really be covered in this document.

Within a couple of weeks of this initial meeting I was informed that Draft number 15 of the portion of the PA being drafted by the Subgroup number 3/4 had been finalized and would be forwarded along with the work of the other 4 or so subgroups to be integrated into the final draft PA. I had previously been informed that when that draft was completed it would be submitted to the Advisory Council on Historic Preservation for adoption—hopefully at their JUNE 2002 Meeting! When I voiced an objection to this time frame, given the fact that NO Tribal consultation had occurred on this document, I was ignored.

This occurred just before the last meeting of the Advisory Council earlier this year (2002). Since the Council was about to meet, I called the staffer who was involved

in drafting the integrated programmatic agreement and was told that if I wish to voice my concerns over the total lack of Tribal consultation on this matter and the rush to adopt it that I would need to take it up with Ray Soon, the Native Hawaiian representative to the Council. I was told to send a note requesting Soon call me about this matter and giving a brief description of the issue which I did. I have yet to hear anything back from Soon on the matter.

KENNETH H. CARLETON,
*THPO / Archaeologist,
 Mississippi Band of Choctaw Indians.*

Chairman INOUE. Thank you very much, Mr. Day. I am aware that you are here against your doctor's orders.

Mr. DAY. Yes, sir.

Chairman INOUE. And I am aware that you are undergoing radiation treatment at this moment, and for that I thank you very much.

Chairman INOUE. May I begin by asking Mr. Snowden, you just heard Mr. Day. If my interpretation of section 106 is correct, the Government is the one that should conduct the environmental assessment, and you are supposed to bear the cost. Am I wrong in my interpretation of the law?

Mr. SNOWDEN. Senator, the answer to your question is out of my purview. I would be happy to get for the record and for your staff the answer to your question.

Chairman INOUE. Do you have lawyers in the back, sitting there?

Mr. SNOWDEN. I do have some lawyers in the back sitting here.

Chairman INOUE. Will you ask them, or would the lawyer care to take the stand?

Mr. SNOWDEN. What he is saying is that the rules do permit us to act as you have just suggested. It is also important to note that—

Chairman INOUE. Then why don't you do that?

Mr. SNOWDEN. What we will need to do is talk with the members of the commission and find out exactly what our status is on that issue.

Chairman INOUE. And if you are going to do that, you are supposed to bear the costs, are you not, and why has this situation continued for years, as Mr. Day indicated?

Mr. SNOWDEN. Again, I will need to look into it. I am unfamiliar with the—

Chairman INOUE. I will expect a full report from the Federal Communications Commission.

Mr. SNOWDEN. You will have it forthwith.

Senator may I add a point to something that Mr. Day was saying, though?

Chairman INOUE. Sure.

Mr. SNOWDEN. We actually are taking a very proactive approach with this issue, and I notice some of the documents he was holding up are from previous commissions, and that is not stated to negate our responsibility, but it is important to note that we are, through this reorganization of the agency which the Congress has just passed, we are respecting the Tribe's sovereignty, the role of the sovereign Governments, and we will also respect the interest of confidentiality, because I think you are absolutely right, we need to keep this information confidential in terms of what is going on.

So that is our position at this point, but I will get information back to you shortly.

Chairman INOUYE. There is a law that says that in order to—well, receive certain universal service subsidies you must be designated an ETC.

Mr. SNOWDEN. That is correct.

Chairman INOUYE. And now that ETC must be under State jurisdiction?

Mr. SNOWDEN. Well, it depends, sir. The reason we get involved from the Federal level is when both the State and the Tribes are asserting jurisdiction, and that is at the request of a carrier, and so as Mr. Stanton and Mr. Day and others have—Mr. Strand has also mentioned, our agency, we get involved through the law that we have submitted, or we have enacted to make a decision on if the carrier should have ETC status or not.

It is important to note that also we are planning to look into this issue to see if there is a better way to support actual cost of ETC in the competitive markets.

Chairman INOUYE. Is it not true that if the State has jurisdiction over this carrier, and I think that almost all of the carriers, without exception, are land carriers, that the States make it very difficult for wireless cell phones to get into operation in Indian land?

Mr. SNOWDEN. I think it depends where you are. Each State is different, each situation is different, and we review it when it comes to us on a case-by-case basis.

Chairman INOUYE. Then why does it take so long to process an application of this nature? We know, for example, that in Navajo land there is no telephone service because it is so expensive to lay lines, and it does not take an expert to figure out no company is going to lay that line. Why can you not give it to a cell phone company?

Mr. SNOWDEN. We have committed to deciding the jurisdictional issue when it comes through us within a 6-month period, so our decisions will be made in that 6-month time frame.

Chairman INOUYE. Does it take 6 months to make that decision?

Mr. SNOWDEN. According to our position now it is—

Chairman INOUYE. Do you think we should change the law to 1 month?

Mr. SNOWDEN. I think that is above my pay grade, sir.

Chairman INOUYE. Can you ask someone back there who may be above you?

Mr. SNOWDEN. I think I would need to ask the four commissioners that are currently at the FCC. I am above their pay scale, so it is definitely above theirs, and mine.

Chairman INOUYE. Will you ask the commission? Because we will be submitting an official letter.

Mr. SNOWDEN. I sure will, sir.

Chairman INOUYE. Because something has to be done, because under the present law as it is interpreted by the FCC, we are not going to get anywhere. 6 months will expire, and something else will come up.

Mr. SNOWDEN. It is important to note that we only get involved when the jurisdiction question needs to be answered, so the States

are definitely involved, as well as the Tribes, and so that is when it comes to us.

Chairman INOUE. Now, in your testimony, it was very nice that Indians are involved, that you have a lot of programs for Indians, and in fact Indians are a part of the homeland security program?

Mr. SNOWDEN. I am not sure if I am following what you are saying.

Chairman INOUE. You mentioned that, that there is a role to play for Indians in homeland security.

Mr. SNOWDEN. I am not familiar with what you are asking, sir.

Chairman INOUE. Then I will ask you, do Indian Tribes have a role to play in homeland security?

Mr. SNOWDEN. I think all Americans have a role to play in homeland security.

Chairman INOUE. How can they play this role if you do not have telephones or communication? I am not being facetious, but are we going to have smoke signals now?

Mr. SNOWDEN. Senator, I do not think that is necessarily the route we would take. However, we at the commission do treat homeland security as a very serious issue, and the chairman has established a Homeland Security Policy Council which, of course, we will coordinate and work with from a Government to Government relationship with our tribal partners as well as our State and local governments.

Chairman INOUE. I think most of us assembled in this room have at least three telephones per home. They also have a couple of cell phones, and I think all of the executives sitting here at least have a cell phone in the car, and yet in just about every Tribe there are certain people who cannot dial 911. Do you think that is right?

Mr. SNOWDEN. I think in the situation that we are in today, we need to increase the penetration rate of telephones across the country on Indian lands, in rural America, in some of our poorer sections of the country, everyone. Telephones are no longer just—they are required in life.

Chairman INOUE. I hope you will look into 106 and the ETC.

Mr. SNOWDEN. We sure will, sir.

Chairman INOUE. I think that would bring about some noticeable change.

Ms. Masten, if you had the authority to request something and be granted, what would you request of the Government? Not a whole list, now.

Ms. MASTEN. I am trying to narrow it. You notice I had a little pause there.

I would request that you look at capital, because it is cost-prohibitive, and I think this country recognized that sometime ago when they brought electricity and telephones to America and they subsidized that. I think it is unfair to expect that Tribes should subsidize the burden and cost of infrastructure today, and I would ask that you look at ways to provide the capital, technical assistance incentives and tax credits.

Chairman INOUE. If I am correct, Ms. Warren Edelman testified that you can get grants from the Department of Agriculture and as

a result 6 Tribes have set up their own telephone companies, is that correct?

Ms. WARREN-EDELMAN. That is correct, yes. To my knowledge, and I am not familiar with the program in terms of its limitations, but in order to put together, I believe an application for the USDA you probably have to have a business plan in place and again, as I mentioned before, funds for planning are not adequate. So in order for those Tribes to get to the point where they could probably take advantage of the loan program, they would also need to have assistance on the planning side in order to know that is what they wanted to do.

And again, that is not the solution for all Tribes. Having a telephone, or telecommunications business, as you have heard, is highly competitive, and constantly changing, so I am sure the tribal councils in each of these communities took that into consideration and were able to address those issues, but again, funding needs to be placed in planning programs.

Chairman INOUE. So that program would require some money up front.

Ms. WARREN EDELMAN. I believe so. I think as with any business you have to invest some of your own money before you can actually reap the benefits of other sources of capital.

Chairman INOUE. Is my interpretation of ETC wrong?

Ms. WARREN-EDELMAN. I am not familiar with the ETC issues, other than what I have heard here today.

Chairman INOUE. What about Mr. Day's 106 issue?

Ms. WARREN-EDELMAN. I find it surprising and disturbing, highly disturbing that anyone goes on Indian lands, whether they are there walking across it, or surveying it, or doing anything other than working with the Tribe to help preserve that land in the name of their own business, especially when the business is not beneficial to the Tribe, nor is it something that the Tribe wants.

All—all—interaction with the Tribe should go through the tribal council, be respectful of sovereignty, be cognizant of sovereignty and its jurisdictional issues, and work from there.

Chairman INOUE. I will await my second turn. Chairman Campbell.

Senator CAMPBELL. Thank you, Mr. Chairman. Well, there is certainly some diverse testimony. I am sorry I missed Ms. Warren Edelman's. I heard the rest of it, though. I guess certainly one of the agreements is we have got a problem, we need to find a solution. I do not know how many have lived without telephone service, but when I moved back to the reservation, just 20 years ago, 22 years go, we had no phone service, and I can tell you that what maybe would have been considered years ago a luxury darned sure is not now. It is literally an absolute necessity as our lifestyle, our livelihood, and our safety in many cases is somehow related to our communication ability, so I appreciate your testimony.

Sue, nice to see you here. We do not see you here as often testifying in front of the Committee as you did when you were president of NCAI. We miss you, but I know you are doing good work in California. I hope you will give my best regards to the Apina family. I used to teach them years ago in Indian school, taught them jewelry-making when I had a real life, as I sometimes tease, and they

were terrific friends. And I was particularly interested in hearing Mr. Day's comments, too, in that I had no idea, if that is actually happening, that the FCC or any company can just pretty much arbitrarily come on Indian lands and without the consent of Tribes, which surprised me, so let me maybe start with Mr. Day.

Is that pile of information you have in front of you there, Mr. Day, that whole pile of documents, does that deal with promoting the telephone service on the reservation, or the roadblocks preventing it?

Mr. DAY. No, sir. All of these are not on the reservation.

Senator CAMPBELL. I see.

Mr. DAY. That is the point, and Senator, if I may proceed, we are not attempting to be obstructionist in this at all. I get very frustrated when I used to come to Washington out of New Orleans on the train, only in Atlanta, Georgia I could use the phone, but when the train moved I had to wait till we get to Richmond because there were not any towers in there, so I am not opposed to the towers.

What I am opposed to is the invasion of tribal sovereignty by these people, where—the FCC apparently does not understand what the law says is that we have a vested interest in aboriginal lands, and a right to assert ourselves in the protection of those sacred properties and traditional cultural properties, and these all deal with that issue. There is not a single one of these that deals with a cell phone tower on the reservation, although we have been trying to get one.

Senator CAMPBELL. So it is your view that existing laws are not adequate to protect sacred sites, tribal sacred sites?

Mr. DAY. Well, no, sir, they are not, and they are totally—they are really quite inadequate. The only thing we have is Executive Order 13007, which deals with sacred sites on Federal lands.

There is, of course, as you are probably aware—the Senator from West Virginia is preparing some legislation on sacred sites, but there is also in section 106 and in the advisory council regulations provisions for us to be able to assert ourselves off the reservation in those areas. And sir, if I may, this little document—that little document is the Native American Historical Initiative with the National Guard, wherein we have established memorandums of understanding, and the very first programmatic agreement on a military installation that the advisory council—I think Ms. Hauser is sitting back there—has approved, that the Army has approved, that the Tribes have approved, so we all know what book we are reading from and what table we are sitting at, and it works fine. In fact, this has been used as a model across this country, not just by the military.

We established the very first Keepsake Heritage Cemetery at Camp Beauregard in Louisiana, where the so-called culturally unidentifiable human remains, any human remains can be reinterred. We have now done the same thing with Fort Benning, a major Army Infantry training center. We are now doing it in Mississippi with the Mississippi National Guard, and incidentally we have a sacred site fully protected, fully understood in the direct middle of the major tank training range at Camp Shelby, Mississippi. That

site is not disturbed. It does not interfere with the military mission, which is just as important.

As the Senator said over there, do the Tribes have a role in this? You had better believe they do. Yes, we do. I am still in the State militia, Senator.

Senator CAMPBELL. Who would have guessed?

[Laughter.]

Senator CAMPBELL. Thank you, Mr. Day.

Ms. Masten, Sue, the Yurok Tribe, have you applied to these programs that are available like Life Link, Link-Up America, technology opportunities and things like that?

Ms. MASTEN. Well, if you do not have a telephone, you do not have a use for those services, so for the Upper Reservation, no, but on the Lower Reservation, and that was one of my recommendations, was the carriers, the local carriers are not getting the word out to those who need it the most so that they are aware of the services and can take advantage of that, and I had asked for a recommendation to the FCC to encourage those local carriers to partner with the tribes to get the message out to those members who do have phones, so that they can take advantage of those services.

Senator CAMPBELL. When I mentioned when I first moved back to the reservation, I remember experiencing difficulty in having a telephone put in. As I remember, they told me that it cost too much to put a phone in to where I lived. We finally had to get a bunch of other people, and it took about 2 years as I remember, that also wanted to be in that link-up, and we had the—what is it called when a number of people are on the same line? We had that for a long time before we got a private line, but you mentioned various telephone companies would not put phone lines on the reservation because it was not economically viable. That has been your experience, too.

I can understand that at least from one perspective, because they are businesses. They have to make a profit, and I guess like the REA, in the olden days, that is why the Federal Government subsidized the REA to electrify the West, because it just could not be done with private incentive.

Maybe, let me ask one or two more, one to Mr. Snowden.

Ms. MASTEN. Senator, could I just add a point?

Senator CAMPBELL. Yes, please do.

Ms. MASTEN. Even wireless for the reservation, how is that going to work if we do not have power? So that is a concern, too, so that opportunity for anything else that may be out there to take advantage of. We are further disadvantaged by the fact that we do not have electricity, either.

Senator CAMPBELL. Are you asking me how it was going to work? We get to ask the questions.

[Laughter.]

Senator CAMPBELL. Mr. Snowden.

Mr. SNOWDEN. Yes, sir.

Senator CAMPBELL. I hope you got Mr. Day's message kind of loud and clear. It sure came clear to me. Let me ask you a couple of questions here. In the Administration's budget this year, there has been a program reduction of the technology opportunities pro-

gram from \$45.4 million to \$15.5 million. How do you justify that huge cut?

Mr. SNOWDEN. That is actually the Department of Commerce.

Senator CAMPBELL. Oh, excuse me. It is in the Department of Commerce?

Mr. SNOWDEN. I will gladly give that to them.

Ms. WARREN EDELMAN. I am not them any more.

[Laughter.]

Senator CAMPBELL. Well, who would like to answer that on behalf of the Government? You are the only one here, are you not?

[Laughter.]

Mr. SNOWDEN. In all due respect, I think I will defer to my colleagues in the Commerce Department to answer that question for you.

May I address something that you brought up with Mr. Day—

Senator CAMPBELL. Yes.

Mr. SNOWDEN.—with respect. The commission has been very clear that companies must get permission from the tribal leaders before they go on to tribal lands, and I am not sure where the breakdown is with understanding that, but that is clearly one of our rules that we have put in place, so the issue that we see, we are seeing some difficulties when the Tribes want to go off the tribal lands, and that is some of the challenges.

Senator CAMPBELL. As I understand the sacred sites law, that if there are sacred sites designated, identified and designated, even if it is not on tribal land, there has to be some consultation with the tribes—

Mr. SNOWDEN. Correct.

Senator CAMPBELL.—before the Federal Government can do that.

Let me ask you about incentives. What are incentives given to provide groups like Bell South, Verizon, or some other companies? Are there incentives now from the FCC to encourage them to go onto reservations?

Mr. SNOWDEN. Well, the Lifeline Link-Up program itself, the universal service program itself is an incentive for carriers to actually go onto these reservations and provide, particularly in high cost areas. A piece of the universal service program directly talks to high cost areas, and the reason that was put in place was so that they would have the incentive, because they know they could go into a reservation where it is a high cost area at a reduced price, or a price that is lower, comparable to an urban area.

Senator CAMPBELL. Mr. Strand, as I understood your testimony, you would like to see the FCC hold public hearings on designating eligible telecommunications carriers for entering reservations. What are your objections to FCC preemption? Has that already been answered? I heard you mention that in your testimony a little bit.

Mr. STRAND. Mr. Chairman, Senator, our objection to the FCC doing these reviews is that the process they have is not conducive to fully developing a record on whether the carrier's representations in their application are true.

One thing I want to emphasize as much as I possibly can is how important ETC designation is. This is the lifeline that people have to the national network. In Montana, with a very sparse population

distributed across the State and terrible weather conditions, especially in the winter, universal service is what people rely on to get emergency services out to rural ranches and farms. The State Public Service Commission has to be assured that phone service is going to work.

In the case, for example, of a wireless service that is served by backup batteries, those batteries typically last about 8 hours. If you have power out for 3 or 4 days, the Public Service Commission is going to be understandably reluctant to say, "by all means you (the wireless provider) be the universal service provider in this rural area, and if the power goes out, the folks are just out of luck."

Senator CAMPBELL. You mentioned the investment. I wrote in my notes here, \$2 million investment when you set up telephones on the Crow Reservation. Well, how do you end up with a profit if you have to make an investment like that on the reservation?

Mr. STRAND. Well, first of all we are nonprofit telephone cooperatives.

Senator CAMPBELL. I see.

Mr. STRAND. And the other way we fund our operations is using universal service dollars.

Senator CAMPBELL. Well, it sounds like that could be a model for other places. Are there reasons why that cannot be used on other reservations?

Mr. STRAND. No. In fact, that is being used on the other reservations in Montana.

Senator CAMPBELL. You mentioned the ones in Montana.

Mr. STRAND. As I mentioned in my testimony, U.S. WEST sold most of their reservation areas in their 14-State region, is my understanding, across the West. Particularly when they sold properties to cooperatives such as the ones I represent and other cooperatives in Montana, Wyoming, North Dakota, South Dakota and so forth, the reservations in those areas are seeing the same kind of results that we have seen at Project. Therefore, it is very important to differentiate the different circumstances that exist on different reservations.

Some of the horror stories that you have heard today are quite true, but with regard to other reservations, the information that is available on the FCC Web site, for example, is hopelessly outdated.

Senator CAMPBELL. Ms. Edelman, I am sorry I did not hear your spoken testimony, but looking through my notes here, you mentioned the price of telecommunications equipment and a very limited amount of Government grant money, only a few Tribes getting benefits from these modest grants. What is the solution to that, that we just try to put more money into the FCC for the grant program?

Ms. WARREN EDELMAN. I would say through some of the programs that are working already that have a proven record. make sure that they continue to be funded. And again, some of those that I listed, that is just a partial list. The FCC does need to have some funding I think for their tribal liaison to be able to travel to Indian country, I think. You know, assuming that Tribes are going to call in to get information it is kind of a silly point, you know. There are no phones out there to find out about that. Again, access on the Internet, that is beside the point. There is no access.

Senator CAMPBELL. Ms. Masten testified—she mentioned, I heard her say something about three businesses on your reservation have no phone service, which I cannot imagine, running a business with no phone service in this day and age. But do you have any information on businesses that have succeeded or failed on reservations because of the access, or lack of it, to phone service?

Ms. WARREN EDELMAN. Just anecdotal information, things that I have been told, basically things like, you know, our one telephone line we have to use for a fax, and then we have to use it to try to e-mail documents out to people. We cannot keep up with the competition. Same kind of thing, if you want to take it to another level with e-Government, and especially with the Federal Government doing work with the Tribes and sending funding applications and all that, you cannot do that if you do not have access.

And the more we move towards e-Government, which sounds fantastic for the rest of the country, the more we leave Tribes behind, even for the basic grants and necessities that they need, so it is a serious situation, but it is going to get worse as the time goes on. I think the rest of the country forgets that there are these corners of the United States that are worse than Third World conditions. You need that infrastructure in order to keep up and in order to prosper, period.

Senator CAMPBELL. Thank you, Mr. Chairman. I will wait for another round.

Chairman INOUE. Mr. Strand, in your response to one of the questions you said that the wireless may be dependent upon electricity and battery and when there is a huge snowstorm it might be tied up for hours, if not days, and therefore the quality of service may not be the very best. How do they get any service whatsoever if we take that attitude?

Mr. STRAND. When you say “they” you mean Native Americans?

Chairman INOUE. Yes.

Mr. STRAND. I think when you asked earlier whether you were correct on the ETC issue. You were sort of right and wrong. When we have an Indian reservation that has terrible service today and there is no wire line provider willing to provide service, then absolutely wireless service has to be the next step.

But when you have a reservation, for example, like the Crow Reservation that already has 85 percent penetration and improving, and the service quality is ten times better than what they are going to be able to get from a wireless provider, then the question becomes, what sense is there in designating a second ETC to serve that area?

And of course, backup power is only one of the issues. Congestion is another issue.

Chairman INOUE. Well, Crow has 85 percent. What about Navajo?

Mr. STRAND. I am not familiar with the Navajo Reservation. I am only familiar with the Montana reservations.

Chairman INOUE. Well, according to numbers that are provided to us, although it is said that adequate data is not available, what little data we have would indicate that about half the homes in Indian Country have no telephones, and less than 30 percent have any access to Internet or computers. How do we cope with that?

Mr. STRAND. I absolutely agree that if there is no wire line provider that is willing to provide service—that would be the preference, because wire line service is going to give them the high speed connection to the Internet. Wire line service is going to give them reliability. Wireline is going to give them redundancy. But if there is no wire line provider that is willing to provide service, then wireless is their only alternative.

Chairman INOUE. Well, we have been advised that it is not fair to give wireless people the grants, universal service grants because the cost is less than the wire line operators, and if that is the case, we will never have service.

Mr. STRAND. Allow me to explain. The wireless service costs less than wire line service. However, wireless service is not as robust as wire line service. We are talking about apples and oranges.

Chairman INOUE. It may be apples and oranges, but in the end it is communication, is it not?

Mr. STRAND. In the end it is communication and as I have said, where a reservation is served well by a wire line provider, that is the preference. If there is no wire line provider willing to provide service, then by all means a wireless provider should be providing service there.

Chairman INOUE. Then you would say it is okay to have wireless service go into Navajo land now?

Mr. STRAND. I have no problem and never have had any problem with wireless going into Navajo land.

Chairman INOUE. Any other place where you do not have wire line services?

Mr. STRAND. Right. If there is no wire line provider willing to provide service, I have no problem with wireless service.

Chairman INOUE. So you have no objection to the Yuroks getting wireless service?

Mr. STRAND. Absolutely none. I would like to see the Yuroks get wire line service because I think it is so much more robust, but not if there is nobody willing to provide it, and my small 5,000-line company in Montana is probably not going to go to Northern California.

Chairman INOUE. Mr. Stanton, what is your position on ETC, the thing we have been discussing here? I am sorry I was not here to listen to your testimony.

Mr. STANTON. I would be happy to respond, Senator. We view our company to be deeply committed to providing services on Native American lands. ETC is an indispensable part of that. The ETC process is broken, in my view. The 1996 act was intended to make services available, competitive services available to all, as I understand it, and the ETC process delegated to the States—excuse me, the act delegated to the States responsibility in rural areas, where certainly within Western Wireless's area all of the Native lands are in rural areas, as defined by the Congress and the FCC.

We have suffered in many States—we applied 4 years ago in 14 States. There are still 2 States that have not acted upon our ETC applications.

Chairman INOUE. In 4 years?

Mr. STANTON. There are a number of States—excuse me.

Chairman INOUE. How long, 4 years?

Mr. STANTON. Four years. As many as 4 years, and in fairness, Senator, some States acted much more promptly.

In South Dakota, for example, it took us two round trips to the State supreme court and Federal court in order to finally get granted as an ETC in the State in rural areas. We have continually been bombarded with requests, and I want to correct a misstatement that you did not hear, Senator, but Senator Campbell did, that in Montana we had a request for 465 different interrogatories, and I attributed it to Mr. Strand's organization, and he corrected me, quite politely told me it was not his company, ITA. It was instead MTA that made the 465 requests.

But the example still stands, that to get a relatively simple request, to get 465 interrogatories over an application to provide service is in my estimation ludicrous, but what it does, I was saying to one of my lawyers this morning, it is like the two guys in the woods with the bear coming, right, that as a practical matter for us we have limited resources, and when the bear is running through the woods, and the one guy starts running off, and the other guy puts on his tennis shoes and he says to his friend, I am putting on my tennis shoes because I do not have to outrun the bear, I just have to outrun you.

As a practical matter, what is happening is that the more litigious independent telephone companies are chasing us out of their jurisdictions and into jurisdictions where it is less difficult.

Lastly, with respect to the FCC on tribal lands, we have made applications, including in the Crow Reservation, where Mr. Strand was taking about the great progress his wired company has made, that has been pending for nearly 2 years at the FCC, we have gotten the FCC's grant of ETC status on the Pine Ridge Reservation in South Dakota, but it took a lot of litigation at the State level, and then we had to reach an agreement with the Tribe, which we did in our agreement which was signed in this room 2 years ago, in order for us to finally get authority to go in.

So the State, Federal, and litigation hassles are delaying the implementation of service.

Chairman INOUE. I went to law school. Maybe we have too many lawyers.

[Laughter.]

Mr. STANTON. I did not say that.

Chairman INOUE. Do you suggest any amendments to the law?

Mr. STANTON. I suggested a couple of things. Number 1, the 1997 amendment to the 1996 act, which I believe is section 214(e)(6)—someone behind me will correct me if I am wrong. Someone behind you is nodding—was, as I understand it, intended to clarify that on Indian lands that if the States did not act, that the FCC was authorized to act, and it is my understanding that the FCC views that to be unclear, at least in some of the discussions we have had with the staff, the lack of clarity slows down actions on Indian land.

Second, frankly, the delegation—

Chairman INOUE. How would you clarify it?

Mr. STANTON. Well, I am not a lawyer, but I would defer to the FCC and your staff to provide the clarity. All I am interested in is being able to get my applications processed promptly.

Second, to either set standards or limitations in terms of the amount of time to be considered, both at the State and Federal level. As I have indicated we are waiting years in some cases on applications that affect Indian and non-Indian lands at the State level. They are being held up because of litigiousness and manipulation of the process by the telephone companies, but also, frankly, because of staffing and prioritization decisions being made at the State level.

The Feds, the FCC is slow for reasons having to do with their heavy work load, which is understandable, but if this is, in truth, a priority, then there ought to be some deadline. I cannot argue as to whether 6 months or 1 month is reasonable, but frankly, Senator, I would be thrilled with 6 months, given that some things are pending for as long as 2 years.

Chairman INOUE. I am not an expert on cell phones, but is the service that bad in rural areas, as suggested?

Mr. STANTON. You know, I have spent my entire career doing nothing but wireless communications, and we have provided—as I indicated in my opening statement, my companies have built systems in places like Haiti, Ghana, Ivory Coast, as well as in rural America, as well as building the Voice Stream business here in the United States, all businesses that I have had the pleasure of co-founding. The quality of telecommunications service is better.

If I may give you an example, last night I was at the Willard Hotel. The data speeds in the hotel are between 14.4 kilobits per second, or 28.2, probably the same speeds you would get at home. I connected my laptop to the Internet via this card, and I got between—depending on the time, between 48 and 56 kilobits per second, two to three times that I would have gotten if I had used the wired connection, just a simple laptop computer. Moreover, whereas if you connect to a wired line you are using that circuit, you are consuming that circuit, if you will, for all of the time you are on your laptop, so for example, if you want to respond to a message while you are typing before you push the send button, you are paying for the time.

With a packetized data services, which most wireless companies have or are introducing, you have the ability to only pay for the messages you deliver, and so for us, we have the ability and have introduced services in rural and urban areas that offer high-speed data services.

The quality is improving. The new services that are being introduced by other carriers and by ourselves will eventually, within a couple of years, offer 2 megabits per second. The ability to offer one technology called 802.11—the marketing people did not come up with that name—offers up to 11 megabits per second.

I can respond to Mr. Strand's comments about reliability and power consumption if you would like, but fundamentally the quality of wireless service in my estimation can be whatever the carriers are willing to invest. And if carriers are doing things on the cheap, clearly if you do not have battery backup, or if you only have battery backup in areas where there is a weakness in the power grid, the system can go down.

Most of our sites where there is a weakness in the power grid have generators, and we have generators with the ability to provide

power for long periods of time which in rural areas unfortunately happens, and is unfortunately necessary.

Chairman INOUE. Any other suggestions on our laws?

Mr. STANTON. I guess the other suggestion I would make that I made in my prepared comments really goes back to ensuring that the systems that provide support are open and nondiscriminatory. Many of the subsidies that support the wired telecom network, with which I take no argument, are buried deep in very complicated accounting systems, so when you say, we subsidize rural areas, you may well be right, but it is very difficult to get to what that number is.

Wireless is almost always, in areas below 10 people per square mile, a more economic way of providing telecommunications services. And as a consequence, if you go into rural areas, and my company, Western Wireless, provides service in the vast majority of areas within the continental U.S. that have less than 10 people per square mile, you go into rural areas and wireless economics almost always dominate wired economics.

But what happens in Senator Dorgan's home town of Regent, North Dakota, where we launched service, we were offering service for about \$15 a month. Our competing wired telephone company was offering—I am sorry, the competing wired telephone company, the company we competed against, was offering service for about \$15 a month. They were receiving subsidies embedded in the system of over \$180 per customer, per month.

Now, our costs are dramatically below that, and we can, for probably about half to a quarter of their cost be able to provide them services, but the subsidy systems are difficult to figure out. There is an opportunity for consumers to get better service, and for the Federal Government and industry to save money by simply making those subsidies more apparent, making them explicit, making them nondiscriminatory, and promoting competition.

The last comment I will make, and I apologize for monopolizing the microphone, Mr. Strand made, I thought, a very impressive statement about the things that his company has done on the Crow Reservation, and I was unaware of them, and I applaud them, but fundamentally all consumers benefit from competition. If you allow us to introduce service, I would assert that we will make the competitors that we have in the markets where we serve better. We will push them.

In Regent, North Dakota, for example, the competitor began providing more service opportunities, more service offerings after we launched our service, and I think what we have seen in American industry is the introduction of competition almost universally forces people to get better, and that is what I think introduction of wireless on a fair and nondiscriminatory basis can allow in telecom.

Chairman INOUE. Are you receiving universal services subsidies in any of your operations?

Mr. STANTON. We are. We service between 12,000 and 13,000—I cannot give you the exact number—fixed, what we call our wireless residential service, WRS service, and in most of those we receive either State and/or Federal subsidies in those programs. But frankly that is only a small fraction of the areas where we would

like to provide service, and it is only where we have been designated as an ETC, and where there are universal service subsidies available.

Chairman INOUE. Thank you very much. Mr. Strand, do you have any comment?

Mr. STRAND. The only two points I guess I would make with regard to a couple of statements Mr. Stanton made, number 1, they do have generator backups for a lot of their tower sites in Montana. Unfortunately, that does not do the customer any good. That keeps the signal going out, but the customer at their home has their hand-held device, or their wall-mounted wireless device. That has a backup battery system that is plugged into the wall. After 8 hours of standby it is done. There is no more power. So the fact that there is a generator at the tower site does not do the customer any good.

The other issue is with regard to Mr. Stanton's discussion of all the interrogatories and discovery that has been promulgated. Just to give you an example, when they filed their application in Montana, they claimed to provide cellular service across the State. As evidence of that they attached an exhibit that took an 8½ by 11 piece of paper with an outline of the State of Montana, and somebody had taken a black marker and filled in the whole State.

That was the single piece of evidence to show that they provided service throughout the State, and then they claim to be surprised by all the interrogatories that are fired at them. The State public service commission wanted to know, well, where are your towers, where are your service areas, where are your dead spots? You cannot just give us a map that has been colored in with black marker and tell us that you serve the whole State.

So those are the only two points that I would make. Thanks.

Chairman INOUE. Well, Mr. Day, you have started something here. Do you have anything to add?

Mr. DAY. Yes, sir, I do, and I appreciate the opportunity, and again it goes back to Mr. Snowden's references to trust responsibility, sovereignty, and especially Government to Government.

The Federal Communications Commission convened a coalition of cell phone representatives, their attorneys, State historic preservation officers, and others to produce what is known as a programmatic agreement on colocation towers, the installation of additional antennas. There was not one single Indian interest involved in that development of the programmatic agreement.

We found out about it almost at the last second. We were not even privy to the fact that it was going on till the last second, and a number of the Tribes did provide comments on what we were able to read, because we realized that they were grandfathering in all of these towers that had been built without adherence to section 106, and that they would not have to go back in and resurvey or relicense. They could just go ahead and stick these antennas up, although there would be in many instances ground disturbances that would require a 106 survey.

That was rammed through the advisory council at its meeting in Arkansas. I was told by a member of the advisory council that the Indian comments were not only not included, they were not allowed, and that became a programmatic agreement which is affect-

ing everybody in this country, and now the FCC has put together another coalition of peoples, again State historic preservation officers, attorneys for the cell phone companies, cell phone company representatives, again, no Indians, on a programmatic agreement on new locations, and how that will be done.

And although we do have a stake in that, we have not been included in any of these wonderful programmatic agreement Committees, or whatever you wish to call them, and our understanding further is that they intend to ram this new programmatic agreement without our involvement through the June meeting of the advisory council here in Washington, D.C., and Senator, we beg and implore of you to please tell these people to stop and desist until everybody is included, then we have some voice in this, and this does not become another programmatic agreement which shuffles us off to pre-Custer.

Chairman INOUE. Thank you. Senator Campbell.

Senator CAMPBELL. Just a couple of closings, Mr. Chairman, thanks.

Mr. Day, are there remedies now through the courts when Tribes are not included in agreements locating towers or anything of that nature on lands that may be in sacred sites that are not on reservations? You mentioned there was no tribal involvement or people asked to participate in that.

Mr. DAY. Well, sir, at the risk of seeming to be facetious, the impediment we have is the cost of attorneys. I literally went around the circuit with my hat in my hand saying, can you put a few dollars in so I can hire Gregg Smith over there to represent us here.

Now, as you well understand, and well know, there are some very wealthy Tribes here in the South and East, but there are an awful lot of us who are still poor as Job's turkey, and the fact of the business is that it takes money to go to court, and it takes money to prosecute something successfully.

Now, we have offered—more than offered, please let us sit down and work out something where it is mutually beneficial to everyone, and that we do not have this strife, and we hear that they are wanting to work with Indians. Fine, I am offering, hey, here I am. I volunteer. I can give you a few more, that gentleman sitting right there by you, I believe they would work with you, too.

We happen to believe, wrongly or rightly, as we tell archaeologists, we are human, too. We are not your specimens anymore, and we would like to be treated—you asked, Senator, what would you ask of the Government and had that wish, I would ask one simple thing for Indian people: respect.

Senator CAMPBELL. Thank you, Mr. Day. Certainly your words are well taken by anybody who is close to the Indian community, but aside from that, the question of land line phones versus cellular phones, that has been an interesting discussion, Mr. Chairman. I am not an engineer, so I do not certainly pretend to understand a lot of the variable things, but I kept wondering in my own mind if there are not some common threads.

The Navajo reservation, the Crow Reservation came up a number of times, and I have been on both of them a lot of times, a lot. My dad was in Crow Agency Boarding School, and I lived near the Navajo Reservation now, and they have several similarities. One is

that neither one have many—maybe none, 14,000-foot peaks as we do in Colorado, that makes some real complications with cell phones, even though they are making terrific progress.

I can remember 5 years ago there were many places in Colorado I could not use one. Now there are very few places that I cannot, unless I am right in the middle of some of those peaks, so that is one commonality.

The other is that they both have proximity to pretty good size towns on one part of the reservation, Hardin and Billings for the Crow, and Gallup for the Navajos, and another one is, they both have interstates that go through the reservations. I think it is Interstate 90, if I am not mistaken, that would be Crow, and I forgot whether it is 40 or something through the Navajo Reservation, and you probably do not have this, and it is kind of a rhetorical question, but I would think that because they are also very large, in the millions of acres, that some places land line phones would seem to me more logical to use. In other places, cellular phones would be more logical to use, too.

I just throw that out without asking for a question. It just seems to me that there are places for both. Clearly, as Ms. Masten mentioned, there are some places you have to build roads to get the towers, and you have to make a lot of land changes, and a lot of Indian people are somewhat suspicious about those land changes, too, but I would just say the way technology is improving, there is hopefully going to be room for both that are going to help the lives of Indian people throughout the Nation with each passing year.

Thank you, Mr. Chairman. I have no further questions, and thank you for appearing today.

Chairman INOUE. I thank all of you for your patience in being with us. Mr. Snowden, my apologies to you. I realize you are a liaison officer, and you do not make policy here, but I just wanted you to convey certain messages to the FCC, and I am certain you will.

Mr. SNOWDEN. I appreciate the opportunity, Senator.

Chairman INOUE. All of you, thank you very much.

[Whereupon, at 12:15 p.m., the Committees adjourned.]

APPENDIX

PREPARED STATEMENT OF HON. TIM JOHNSON,
U.S. SENATOR FROM SOUTH DAKOTA

I want to thank Chairman Inouye and Chairman Hollings for holding this important Joint Indian Affairs and Commerce Committee hearing on Telecommunications Issues in Indian Country. As those of us who represent large Native American populations know, it is imperative that we do more to address the needs of Indian Country to create a level playing field for all our citizens.

I am pleased we have the opportunity today to address a significant problem facing many Native Americans—the lack of reliable, affordable telecommunications services. The vast majority of Americans take their telephone service for granted. When they need to call their neighbor, a relative living half way across the country, or 911, their telephone service is there. That isn't the case for all Native Americans.

Unfortunately, market conditions contain few incentives for private sector investment in basic infrastructure on reservations. Meanwhile, we spend much of our time here in Washington debating how to deploy exciting new technologies to our communities, while neglecting the basic needs of so many of our residents. Basic phone service isn't a cutting-edge topic, but all Americans deserve basic telephone service. I am pleased that the Committee understands our responsibility to address current inadequacies, and to work together with the private sector to create conditions that make deployment of telecommunications to rural areas a win-win situation for everyone.

I'm pleased by the diverse panel we will hear from today. I especially look forward to Mr. John Stanton's testimony as it relates to Western Wireless' investment in the Pine Ridge reservation in South Dakota.

PREPARED STATEMENT OF M. TERESA HOPKINS,
VICE-PRESIDENT, INDIGETEC, INC.

SITE SPECIFIC MARKET ANALYSIS:

There are several ways to approach a solution to the dilemma of "connectivity" within Tribal Communities. There is a need for a specific focus on discussing tribal governmental telecom policy initiatives that involve development and sustainable funding. The potential regulatory hurdles, security and interference issues and the need for ubiquitous coverage are severely magnified on Indian reservations.

As part of the federal trust responsibility to tribes, U.S. wireless carriers need more attractive market-based federal incentives to enable public wireless access in Indian Country in a manner that is sensitive to the users' locations and data needs. Quite understandably, U.S. wireless carriers use business models that leverage broad coverage wireless data offerings in densely populated areas. These business models are antithetical to Indian Country, i.e. increased spending by the existing subscriber base will improve profitability. In response to the need to deploy in the fiercely competitive wireless market, there are now many small wireless participants working to deploy in strategic locations, in what basically amounts to a "land grab" of unconnected hotspots. The Navajo Nation, with over 25,000 square miles in the Four Corners Area, is one of these hotspots.

Within one to two years, I expect the "land grab" phase will be over and one of two things will happen: the mid-sized players will consolidate to create a national or regional footprint or one of the larger aggregators will corral the smaller carriers under one extremely anti-competitive umbrella. In the meantime, the federal government must ensure that each wireless players' business model is responsive to the needs of grassroots native communities and provide companies an incentive to see the value of investing in what are some of the most unique low penetration markets in the world.

RECOMMENDATIONS:

- Basic, terrestrial and further exploration of affordable, supportable, and sustainable broadband wireless solutions should be examined. In most cases, a tribal policy and tribal—based telecom planning and deployment initiative should be made available to tribes that determine entry into network service, perhaps in combination with common carrier services.
- Other tribes with a small land bases may consider service enhancements and upgrades by agreement with the various service providers.
- Tribal telecom planning funding should be made available to include costs for assessment, business planning/modeling, and engineering. Funds for planning and development would include packaging, loan development and business development options.
- Tribal Colleges, in the collective, should develop a training model whereby staff, can attend and learn network support skills, applications, and distance education methods; this might include Microsoft certification for advanced networking support and the like.
- Training should be supported via distance education tools as well as provide for onsite training options to tribal participants.
- A component for development, research, and engineering should be developed, to include a tribal legal review component. This is important to ensure what is proposed technically or engineering wise, meets the standard for legal operation under fully developed tribal telecom policy or utility codes. In theory, this will provide technical assistance for tribal legal code development, enforcement, and implementation.
- To develop opportunities for tribal community networking and incorporating tribal technology centers; training or courseware can be for credit or noncredit; develop community networking models; and earned income strategies for individuals, coops, and community development corporations located and serving Indian reservations.
- Develop a federal coordinating council for existing federal grants to ensure there is a leveraging impact of existing federal programs; explore allowing federal dollars to be used as a match for reservation areas in other than 93–638 exceptions in the amendments.
- Delineate tax credit benefits under IRS rules to include incentives for telecom providers to establish facilities, networks, and services on Indian reservation land areas, and to create jobs associated with deployment plans.
- Develop a policy and evaluation workgroup to report on various activities supported by Congress and appropriate federal agencies.
- Reevaluate the subsidies and incentives for technology that are provided either through the states or the federal government. You probably will find that very little of these subsidies actually go back into infrastructure for Native or rural communities on reservation lands. There still is little effort to connect “the last mile”.
- Address the unresolved issue of sovereignty and tribal rights to telecom resources *including* spread spectrum.
- Examine the issue of tribal rights to unused military spectrum or excess spectrum.

NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE
Wyoming, Rhode Island, May 10, 2002

Hon. DANIEL INOUYE,
Senate Committee On Indian Affairs,
Washington, DC .

FOR THE RECORD: Need For Sect. 106 Consultation Between FCC & Tribes On Celltowers

Asco Wequassin (Greetings), Senator Inouye:

The Narragansett Indian Tribe is a member nation of the United South and Eastern Tribes. The *core ancestral territory of the Narragansett Indian Tribe is now known as the state of Rhode Island. As Tribal Historic Preservation Officer and a

Tribal Councilman of the Narragansett Indian Tribe, it is with great concern that I address the issue of cell tower development policies and the government-to-government consultations between Indian Tribal Nations and the Federal Communications Commission (FCC). Indian Tribal sites of significant ancestral cultural resources, sacred sites and sacred landscapes have been under increased threat from sacrilege and destruction caused by cell tower construction excavation.

Pursuant to Section 106 of the National Historic Preservation Act, the FCC, as the federal licencing agency with oversight in the development and use of cell towers, has the responsibility to consult with Federally Recognized and Acknowledged Indian Tribes regarding the protection of these sites from such sacrilege and destruction by cellular carriers and their cell tower developers.

For the past several years, it has been our experience that the FCC has stood aloof from the task of exercising its consultation and regulatory responsibilities in this crisis. FCC has allowed cellular carriers to operate as though FCC had the right to delegate and had, in fact, delegated its government-to-government consultation and permitting responsibility to the cellular carriers themselves. Under the guise of such "consultation", cellular carriers have hired environmental consulting firms to minimally and crudely address the protections afforded by Section 106 to Tribal sacred and significant sites. The 24 Federally Recognized Tribes of the United South and Eastern Tribes, with ancestral lands east of the Mississippi, have been bombarded with thousands of letters from the "environmental scientists" of these consulting firms. These environmental scientists demand sacred site information with no Federal policy in place to protect that information from misuse and abuse.

The letters have often demanded such timetables as ten day information turn-arounds with the expectation that beyond their arbitrary time frames their clients are free from Tribal concerns regarding proposed site excavations. The Narragansett have only begun to truly assess the the degree of sacrilege and destruction to our more remote ancient sites caused by the rapid gearing up and onslaught of the early years of cell tower development.

The Narragansett, apparently, do have the good fortune of being in the smallest of the United States where cell tower proliferation is a Tribal issue. As a result, changes for the good *can* quickly take hold. Sacred and significant site defense strategies which were honed in the Culture and Heritage Committee of the USET under the chairmanship of Bill Day have begun to stem the tide of cell tower sacrilege and destruction against our precious and non-renewable sites of ancient heritage.

In Rhode Island, cellular carriers have begun to acknowledge that gathering site information from the Narragansett should be done in a manner that respects our sovereign status, our oral history tradition, and the amount of work necessary to facilitate the research requests of carriers and developers. *This is not the case in the majority of the other 23 USET Tribal ancestral territories.*

In Rhode Island, where warranted by Tribal knowledge of areas of ancient sensitivity, the carriers and their tower developers have begun to institute archaeological investigations to confirm the immediate presence or absence of sites to be avoided. Further, they employ our on-site monitoring of the archaeological investigation within the excavation footprint of the tower compound and access road as the means to best protect areas of concern from inadvertant acts of sacrilege and destruction. *This is not the case in the majority of the other 23 USET Tribal ancestral territories.*

In Rhode Island, the carriers and their developers have acknowledged that our oral history research, archaeological scope of work advice and monitoring services, now, merit compensation as just another one of the many tower development services. *This is not the case in the majority of the other 23 USET Tribal ancestral territories.*

*(This has not been the case in those parts of Massachusetts and Eastern Connecticut where the Narragansett have Tribal ancestral territories.)

These small shifts toward the positive have been the exception, not the rule, in the experience of the majority of the 24 USET Tribes in the Northeast, Eastern and Southern United States.

The majority of cell tower developers operate as though they are immune from even the "delegation" of the FCC's Section 106 consultancy responsibility with Indian Tribes. Only a very small percentage of the cellular towers currently in existence have been erected with any consideration at all for the need to exercise protocols that protect the sacred and culturally sensitive localities of the Native Nations

from sacrilege, damage and destruction. What has America needlessly and irrevocably lost in the bargain?

The Narragansett Indian Tribal Historic Preservation Office (NITHPO), on behalf of the Narragansett Indian Tribe, vigorously supports Bill Day, Chairman of USET's Culture and Heritage Committee, in his call for the FCC to consult with Indian Tribes regarding the establishment of protocols for formalizing the role of Indian Tribes in the safeguarding of our sacred sites, sacred landscapes and other cultural sites of significance from wanton destruction by continued un-monitored cell tower construction.

Clearly, under Section 106 of the National Historic Preservation Act, the Advisory Council on Historic Preservation regulations thereof, and the active policy for government-to-government consultations with Indian Tribes, the Federal Communications Commission has the responsibility to consult, negotiate and enter into an agreement to resolve these issues with the 24 Federally Recognized and Acknowledged Tribes of the United South and Eastern Tribes (USET).

Tau-botdan-tamock Wut-che Wa-me (We are giving thanks for all things).

JOHN BROWN,
Tribal Historic Preservation Officer,
Narragansett Indian Tribe.

cc: Sen. Reed, Sen. Chafee, Rep. Kennedy, Rep. Langevin

PREPARED STATEMENT OF RICHARD WATKINS,
GENERAL MANAGER, CELLULAR ONE

Thank you Mr. Chairman and Members of the Committee on Indian Affairs and The Communications Subcommittee of the Senate Committee on Commerce, Science and Transportation for this opportunity to submit testimony on the issues addressed at today's hearing.

My name is Richard Watkins. I am the general manager of Cellular One of Northeast Arizona. I am the chief operating officer of the company's cellular and PCS operations. I have lead responsibility for the filing and management of the company's applications for designation as an eligible telecommunications carrier ("ETC").

I. Background

Our company is licensed by the FCC to provide cellular and PCS services to rural areas within Arizona, New Mexico, Colorado, and Utah. We have served Arizona and New Mexico for over 10 years and have recently acquired licenses to serve the other two states. Our service area includes the Navajo Nation, the Hopi Tribe, the White Mountain Apache and the Pueblo of Zuni.

In April of 1999, we applied for ETC status in Arizona. That application was finalized on May 15, 2001 and on June 1, 2001 we commenced providing a new service on the Navajo and White Mountain Apache tribal lands, called VisionOne™, which provides residents with telephone service for a monthly access fee of \$1. Our service permits local calling throughout our network, which currently covers over 15,000 square miles and is increasing as we construct additional cell sites in newly acquired areas. In addition to 911 service, we also provide customers with a long list of health, educational and other community organizations which can be called toll and air time free at any time.

In April of 1999, we applied for ETC status in New Mexico. That application is expected to be finalized in early June, 2002 and we plan to commence providing VisionOne™ service on the Zuni lands on June 15, 2002. Our service offering will be identical to what we have in place in Arizona.

We have recently acquired PCS licenses to expand our service on reservation lands, and have filed, or plan to file soon, applications to extend our ETC service in New Mexico, Arizona and Utah.

II. Without ETC for Competitors, There Will be No Service on Reservation Lands Any Time Soon

Incumbent carriers would have the Committee believe that their networks provide customers with the only acceptable level of service. We disagree.

In the first year since being designated as an ETC in Arizona, we have signed up over 17,000 new customers, most of which have never before had telephone service. In most of these areas, wireline service is available. Today these people can take advantage of the basic telephone functions that the rest of the country takes for granted.

The barrier to telephone service is economic—plain and simple. Before enhanced Lifeline benefits were available, we marketed a lifeline-type service that was priced

at \$10 per month. That offering failed in the marketplace because the price was simply too high. With enhanced Lifeline, our VisionOne™ offering has been an enormous success, and telephone penetration levels in our service areas have increased dramatically.

Since October of 2000, incumbents have had the benefit of enhanced Lifeline and Link-Up benefits adopted by the FCC, but with few exceptions, they have never actively marketed low cost service to the Indian communities they serve. It is therefore time for everyone to agree that incumbent carriers have generally failed to deliver service to Native American communities. Only now, when the **prospect** of competition has arisen, have incumbent carriers even started to acknowledge that they can do more. In those few areas where incumbents have successfully increased telephone penetration, competitive entry will not harm them, and will only help consumers.

The enhanced Lifeline and Link-Up benefits now available to all eligible carriers are excellent tools to increase telephone penetration levels on reservation lands. We ask Congress to make those tools available to competitive carriers who see untapped markets instead of people that don't generate substantial vertical service revenues. Unless the ETC process is reformed to encourage competition, the number of people without telephone service will not decline.

III. The ETC Application Process

As evidenced by the fact that our applications in Arizona and New Mexico took two and three years, respectively, to be granted, it is apparent that the process for obtaining ETC status is seriously flawed. Neither Congress nor the FCC ever intended for applicants to be subjected to a process that amounts to a barrier to entry for all but the most persistent applicants. The standard for obtaining ETC status is rather simple—a carrier must meet the nine point checklist of services

provided by the FCC, and in rural areas it must demonstrate that a grant would be in the public interest.

There is little argument that wireless carriers meet the checklist. In no case that I'm aware of has the checklist been a significant point of litigation simply because wireless carriers do provide, or can provide, each of the checklist items on their existing networks today.

Whether the public interest would be served is an entirely different matter. Incumbent carriers would have state commissions believe that only when an incumbent wireline company can't possibly serve an area should a wireless alternative be considered to be in the public interest. What they want is to retain their monopoly over both their services and government subsidies supporting those services.

Congress commanded state agencies to grant ETC status to competitive carriers. The FCC implemented its Congressional mandate by enacting rules which make very clear that ETC status is to be granted in a competitively neutral and technologically neutral fashion. That more than one carrier may compete for customers has long been found to be in the public interest. That more than one carrier might be subsidized was intended by Congress when it said in Section 254(b)(3) of the 1996 Act:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high costs areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

It is beyond dispute that in many rural areas, especially Native American tribal lands, access to services reasonably comparable to those provided in urban areas is not being provided today. If this provision is to have any meaning, high cost support must be made available to competitive carriers in a technologically and competitively neutral fashion.

We call upon the Congress to reform the ETC application process so that incumbent carriers can no longer turn what should be a relatively simple process into a multi-year litigation. On Native American lands, and on near reservation lands, Congress can clarify Section 214(e)(6) of the Act to empower the FCC to make such grants, and command the FCC to do so within six months of application.

IV. The Payment of Subsidies to Competitive Carriers is Appropriate

Incumbent carriers distort the high cost subsidy program when they claim that a competitive wireless carrier is paid more than the incumbent. In fact, the opposite is true. The high cost ioop support program pays incumbent carriers' costs are on

a “per line” basis. When a competitor enters the market, it is required to accept the “per line” subsidy paid to the incumbent, notwithstanding that the competitive carrier has far fewer lines. In most cases, the competitive carrier is under compensated, and will be for a substantial period of time until it obtains enough customers to cover its costs.

The FCC is the expert agency charged with seeing to it that the high cost loop funds available in the universal service program are properly spent. The agency continues to monitor and review this important issue—and has a Federal-State Joint Board on Universal Service to advise it in this regard. The incumbents do not seek to work with the FCC to more accurately target funds so that the program remains solvent in the long term, but instead they are spending all their efforts seeking to shut off the flow of funds to wireless carriers altogether.

Congress must permit the FCC, which is the agency charged with managing the universal service program, to carry out its mission. There is absolutely no record evidence that the FCC is failing in this regard. How much high cost support the government should provide to rural areas can and should be debated. But for now, the Congress has mandated that high cost support be provided to more than one monopoly carrier in rural areas and that mandate should be carried out for the public’s benefit.

V. The Quality of Service Provided by Wireless Carriers is More Than Sufficient

We have heard incumbents raise fears that wireless networks experience, for example, network congestion, cell site outages, short back up battery life, that will somehow cause Native Americans to get “substandard” telephone service. To this we ask, compared to what? Compared to no service?

We obviously cannot comment on the quality of service being provided by other carriers throughout the country, wireless or wireline. From our perspective, we believe that our service is superior to wireline service, however one has to look at it not from the wireline perspective but from the customer’s.

To give one example, incumbents argue that a wireless phone battery may die and a customer would not be able to make an emergency call. This is true. It is also true that if a house catches fire a customer with a mobile phone can run outside and call for help. In short, if a customer values a wireline phone more, then they will choose the wireline phone. On the other hand, if a customer believes that it is more valuable to have a mobile phone so that it is available whenever and wherever an emergency strikes, then that customer may choose the wireless alternative. While we believe that mobility alone gives a wireless phone far more utility in an emergency, our point is that each alternative has its strengths, and it is the customer who should be able to decide what’s best. It should not be imposed by an incumbent monopoly.

With respect to overall quality, we have constructed our network to provide customers with first rate service. In addition, the provision of high cost support funds will enable us to improve our network in ways that would never be possible without such funding. We have substantially advanced our timetable for cell site construction, addition of channel capacity, and our digital upgrade. Within the next two years, we will introduce wireless high speed internet access which will be competitive with wireline networks. We believe that just the prospect of this happening will induce incumbents in our area to respond by rolling out competitive offerings, all to the customer’s benefit.

VI. Enhanced Lifeline and Link-Up Benefits Should be Extended to Near Reservation Lands

In 2000, the FCC announced that enhanced federal Lifeline and Link-Up benefits would be made available to all qualifying persons living on Native American Reservations and on Near Reservation lands which have been designated by the Bureau of Indian Affairs (“BIA”) without regard to race. Shortly thereafter, the FCC announced that it was suspending its decision, primarily because it was discovered that the BIA had designated areas such as Phoenix, Las Vegas, and several other large cities as Near Reservation lands. Limiting Lifeline and Link-Up benefits to only Native Americans on Near Reservation lands is not a good option because it would likely be unsustainable under the Supreme Court’s Adarand decision, which makes race classifications in federal programs subject to strict scrutiny by federal courts.

We suggest legislation that would require the FCC to undertake a two pronged analysis to determine eligibility for enhanced Lifeline and Link-Up benefits. First, the area must be within a county that has a population density lower than 100 persons per square mile. Second, the subscriber’s billing address must be within 50

miles of a Native American reservation. We suggest using the billing address because it is what the FCC uses to determine a mobile subscriber's location for purposes of determining eligibility for universal service benefits. See 47 C.F.R. §307(b). We believe that this proposal will include the vast majority of Native Americans living in underserved areas near our nation's reservations.

Such a qualification is race-neutral and serves the purpose of the federal Lifeline and Link-Up program. Most low income individuals living in major cities have more service options than people living in rural areas. Adding benefits to people who are served by multiple carriers and have significantly more choices than persons living in rural areas would not be a productive use of government resources. Congress can provide for the rare instance where a Native American tribe is located within a densely populated county by permitting the FCC to waive the rule for good cause shown.

Conclusion

Wireline companies have attempted to force a wireless competitor seeking ETC status to prove that its network is complete and free of any defect, as defined by the incumbent. To this we respond as follows: The high cost support program was enacted to encourage development of service in remote areas. The program has never required landline companies to complete their networks before being eligible to receive high cost funding. In fact, without high cost support, most wireline companies would not have constructed lines to a substantial portion of the high cost areas even today.

It should be obvious that without high cost support there is no business plan which supports infrastructure deployment (wireline or wireless) to substantially all of the high cost areas of the country. Congress commanded the FCC to encourage competitive choice in these areas through the use of ETC status. It is now time, after 6 years of experience, to recognize that changes must be made to encourage competitive entry.

The enhanced Lifeline/Link-Up benefits implemented by the FCC on reservation lands are an essential element in increasing telephone penetration and have been an excellent use of government resources to the public's benefit. By refining the statute, this nation's telephone penetration rate can increase even more. We have proven in Arizona that enhanced Lifeline/Link-Up can make dramatic improvements and we are certain it can happen throughout this country.

Once again, I thank you for this opportunity to submit this testimony.

